

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
SONY MUSIC ENTERTAINMENT, et al., :
Plaintiffs, :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al., :
Defendants. :
-----: :

VOLUME 10 (P.M. Portion)

TRIAL TRANSCRIPT

December 16, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

APPEARANCES:

FOR THE PLAINTIFFS:

MATTHEW J. OPPENHEIM, ESQ.
SCOTT A. ZEBRAK, ESQ.
JEFFREY M. GOULD, ESQ.
MICHAEL J. DRUCKMAN, ESQ.
ANDREW L. GUERRA, ESQ.
LUCY G. NOYOLA, ESQ.
JIA RYU, ESQ.
Oppenheim + Zebrak, LLP
4530 Wisconsin Avenue, N.W.
5th Floor
Washington, D.C. 20015

FOR THE DEFENDANTS:

THOMAS M. BUCHANAN, ESQ.
GEOFFREY P. EATON, ESQ.
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006-3817
and
SEAN R. ANDERSON, ESQ.
MICHAEL S. ELKIN, ESQ.
THOMAS P. LANE, ESQ.
CESIE C. ALVAREZ, ESQ.
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166-4193
and
JENNIFER A. GOLINVEAUX, ESQ.
THOMAS J. KEARNEY, ESQ.
Winston & Strawn LLP
101 California Street, 35th Floor
San Francisco, CA 94111-5840
and
MICHAEL L. BRODY, ESQ.
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
and
DIANA HUGHES LEIDEN, ESQ.
Winston & Strawn LLP
333 South Grand Avenue
Suite 3800
Los Angeles, CA

INDEXOPENING STATEMENTS BY:

<u>WITNESS</u>	<u>EXAMINATION</u>	<u>PAGE</u>
PAUL JOHN JARCHOW		
	DIRECT	2501
	CROSS	2509
SAMUEL RUBIN via video deposition		
	EXAMINATION	2526
	EXAMINATION	2534
KEVIN CHRISTOPHER ALMEROTH		
	DIRECT	2537
	CROSS	2574
	REDIRECT	2591

CLOSING ARGUMENTS BY:COURT'S RULINGS/JURY INSTRUCTIONS

1 A F T E R N O O N S E S S I O N

2 NOTE: The afternoon portion of the case on
3 December 16, 2019, begins in the absence of the jury as
4 follows:

5 JURY OUT

6 THE COURT: Preliminary matters?

7 MR. OPPENHEIM: I think one very quick one and then
8 one with respect to certain slides for Mr. Tregillis. Cox has
9 submitted a bench memo or a proffer on the Audible Magic
10 transaction logs. We received it this morning. I think Your
11 Honor did as well.

12 THE COURT: Oh, the proffer, right.

13 MR. OPPENHEIM: Right.

14 THE COURT: Okay.

15 MR. OPPENHEIM: As Your Honor knows, this has been, I
16 think, briefed many, many times. To the extent the Court wants
17 additional briefing on this, we can submit a response. If it's
18 just for purposes of Cox preserving the record and the Court is
19 going to deny it, then may we avoid additional paper? Whatever
20 Your Honor would like.

21 THE COURT: Okay. I haven't even -- I haven't read
22 it. I made my decision, and I'm going to look at it, but I
23 haven't had a chance to yet, and so if you want me to look at
24 it and tell you whether I want a response, I'm happy to do
25 that, but that may not be until after court today when that

1 happens.

2 MR. OPPENHEIM: That's fine.

3 THE COURT: Okay.

4 MR. OPPENHEIM: I'm not trying to push you.

5 THE COURT: No, that's fine.

6 MR. OPPENHEIM: I'm just trying to figure out what we
7 can do to help.

8 THE COURT: Understood. Okay.

9 Is there objection to slides?

14:07:12 10 MR. ZEBRAK: Yes, Your Honor.

11 THE COURT: Okay.

12 MR. ZEBRAK: I think it would be appropriate if
13 Mr. Tregillis gave us a few moments before -- while we sort
14 this out. If he could leave the courtroom?

15 THE COURT: Okay. Thank you.

16 NOTE: Mr. Tregillis left courtroom.

17 MR. ZEBRAK: Is there -- can you hand up a set to the
18 judge?

19 Your Honor, there are, there are five slides and
14:07:39 20 fewer issues than five, though. The slide numbers that I'd
21 like to talk about are 13, 21, 22, 23, and 26.

22 THE COURT: 13, 21, 23, 26?

23 MR. ZEBRAK: 22, 23, and 26.

24 THE COURT: Okay. Go ahead.

25 MR. ZEBRAK: So on slide 13, this is one element of

1 an analysis that Mr. Tregillis did not include in his report.
2 Beneath, beneath where you see the microphone, there's a list
3 of -- he breaks the works in suit down based on SR numbers that
4 have only one track in it as opposed to an album that may have
5 many more, or SR numbers with multiple tracks.

6 That issue resurfaces when you get to slide 21, where
7 again, the top part of the slide is fine, but the bottom row,
8 where he breaks the world down based on, you know, what's only
9 in an SR or only in a composition or what's in both, you know,
10 this is not analysis he put into his report, and I'll elaborate
11 on that in a moment.

12 And then in slides 22 and 23, the issue compounds
13 itself where Mr. Tregillis then breaks the universe down in
14 terms of, you know, one or the other or both, but then layers
15 in financial information on top of it in terms of his royalty
16 analysis.

17 And then finally on slide 26, this in our view is an
18 attempt at jury nullification, where initially Mr. Tregillis
19 had this notion of permissible infringement or permissible
20 notices. Based on our concerns, Cox's counsel just agreed to
21 remove the word "acceptable," but respectfully, it's the body
22 that falls beneath it, gets at the same issue, which is, you
23 know, asking the jury at what point do notices matter to you,
24 and that's not the purview of this expert. It's not necessary
25 to explicate his analysis.

1 And speaking broadly, Mr. Tregillis, what he did,
2 just to frame this witness, Your Honor, he, he did kind of two
3 analyses. One is he looked at the infringement evidence in the
4 case to see if works matched the notices, and then he did some
5 financial and other projections.

6 So, you know, he, of course, has access to this data,
7 but there's no analysis in the way that I'm addressing here in
8 his reports. There is at most a footnote that referenced an
9 excerpt with small amounts of data, but no analysis, anything
10 akin to what he's done here.

14:10:46

11 THE COURT: In 26?

12 MR. ZEBRAK: For all the slides. 26, 26 is the issue
13 of -- and I apologize if I lumped them together, but 26 is the
14 issue of nullification --

15 THE COURT: Right.

16 MR. ZEBRAK: -- which he brought up initially.

17 But this issue of breaking -- you know, he did an
18 analysis of the works in the case to see if they matched
19 infringement notices, not to be an expert helping the jury
20 understand how the works break down between SRs, compositions,
21 the overlap. And then, you know, he did, he did a simple
22 damages analysis where he tuned everything out and said, I'll
23 look at each work in each notice -- I'll put a dollar on each
24 of them, and it -- you know, what he's getting at here, I
25 think, is further the issue Your Honor heard earlier today

14:11:10

1 about Cox now wanting to address this issue that they haven't
2 put on previously with a witness who wasn't designated to
3 handle it.

4 THE COURT: Okay.

5 MR. BUCHANAN: Good afternoon, Your Honor.

6 THE COURT: Yes, good afternoon to you.

7 MR. BUCHANAN: So with all due respect, I think
8 Mr. Zebrak is incorrect. We pointed out to Mr. Zebrak
9 throughout the -- Dr. Tregillis's -- Mr. Tregillis's report
10 where this information came from, okay?

11 So, for instance, slide 13 and 21 are in Schedule 6
12 of his expert report. He tracks all the musical compositions,
13 checks the sound recordings. And what he's done here, and it's
14 also in his opening brief, he references that.

15 Slides 22 and 23 are in Schedule 6 in the opening
16 report, pages 73 to 74, rebuttal report paragraph 40, and slide
17 26 is part of his reply report, 30 and 32.

18 The point being is what he's done is it's really just
19 showing how he -- one, he's computed the dollar, and then
20 he's showing how he applied it and how he gave them more credit
21 than necessarily they deserved in terms of the dollar and the
22 total amount of notices. So he says you've got sound
23 recordings. You've got musical compositions. Sometimes
24 they're combined, sometimes they're separate, you've got
25 compilations. And that's what he's doing. He's saying --

1 that's all he's doing. He's breaking it out.

2 And it's all in his report. It's just -- you know,
3 there's no data there that's not there. They just don't like
4 for some reason why this is pulled out. They haven't said it's
5 not relevant, but it's in his report. And, you know, so I
6 think it's admissible, and he should be able to testify about
7 it.

8 THE COURT: All right. Thank you.

9 Mr. Zebrak, is it in his report, or is it not in his
10 report?
14:13:29

11 MR. ZEBRAK: Suffice it to say, Your Honor, the
12 analysis in his slides is not in his report. This is not a
13 question of did he have access to data from which he could have
14 done this analysis. Yes, of course, if he had expertise at it
15 and if he actually did that analysis, but, you know, the point
16 is for them to provide a report that states his opinions and
17 the basis thereof.

18 This is being sprung on us now. It's all a reaction
19 to the jury charge conference the other day, where Cox is now
14:13:57 20 having a bulk of his testimony be about viewing the case
21 through the lens of is it an SR, a composition, or both, and --

22 THE COURT: Well, that may be relevant based on what
23 we talk about tonight about whether you can get, you know,
24 royalties for both a recording and a composition, and that
25 certainly -- wouldn't it be relevant to that?

1 MR. ZEBRAK: Well, Your Honor, to be clear, I'm
2 not -- you know, my objection was not based on relevance
3 initially and understanding the copyrights at issue in the
4 case.

5 THE COURT: He said he didn't break it out this way
6 in his report. The numbers are there, but -- I mean, what --
7 there doesn't seem to be a whole lot of analysis. It's numbers
8 we're crunching, right?

9 MR. ZEBRAK: Well, I mean, respectfully, Your Honor,
10 he has an excerpt -- he has a 41-page, single-spaced excerpt
11 cited in the footnote. It doesn't indicate on this Schedule 6
12 that Mr. Buchanan referred to or that they've referred to me to
13 look at, it doesn't talk about the overlap in compositions and
14 SRs, and it certainly doesn't indicate he's going to do any
15 analysis and present it at trial.

16 And, you know, again, it has -- I mean, it has
17 different figures in terms of the number of tracks, too. You
18 know, we've never received any -- you know, initially when he
19 did this Schedule 6, he indicates in Schedule 6 there are only
20 2,369 total tracks in the case. His initial opinion was that
21 we sued -- that two-third of the works we sued on weren't
22 supported by the infringement evidence. Now he says 98 percent
23 of it is.

24 But this analysis he did early on, he analyzed 2,369
25 tracks, whereas the slides today, Your Honor can see how much

1 more it is. He's now at our figures.

2 And it's just -- you know, it comes out of nowhere.
3 There's no analysis of it. And these aren't even the figures
4 he gave back then. It seems to us that he even abandoned his
5 early analysis when he essentially recognized that he
6 approached it in a faulty way and now agrees with us on almost
7 all the works. So I don't --

8 MR. BUCHANAN: So, so that was -- I don't know if
9 you'd call that a head fake or what, but that -- what happened
14:16:23 10 right there was we went off the rails. We were talking about
11 these numbers, and then we were talking about his initial
12 report, where he looked at different data than Dr. McCabe, and
13 then he supplemented his report, but that had to do with the
14 total notices and the matching the ICOMS data and whether he
15 used IP addresses or the ICOMS data.

16 That's not an issue here. They can cross him on
17 this. It has nothing to do with this, zero.

18 All this is is taking -- they don't dispute these
19 numbers. Sound recordings, musical compositions equal 10,017
14:16:55 20 claims were considered. He's accepting their numbers, and he's
21 just breaking them down by those that are both and those that
22 are by themselves. There's nothing controversial about it.

23 But the concern that the Court just raised is isn't
24 this relevant to the issue that may be discussed tonight.
25 That's exactly why they don't want it to come in, but that's

1 not why necessarily he's offering it.

2 This is his analysis, and he's showing, look, I
3 didn't -- I didn't distinguish or not include if they didn't
4 have both the musical composition and the sound recording
5 together. If they had one or they had the other, and that's
6 what this reflects, I counted a dollar. If they had both
7 together, I counted a dollar.

8 It's that simple. I don't know what the paranoia is.

9 THE COURT: Okay.

14:17:38 10 MR. ZEBRAK: Might I add one thing, Your Honor?

11 THE COURT: Yes, sir.

12 MR. ZEBRAK: So first of all, counsel's indicated and
13 pointed us to this schedule. I have no reason to believe that
14 the information on this slide is computed from this schedule or
15 the analysis that went into this schedule.

16 I think he's maybe done this analysis off the current
17 lists of works in the case, but the bottom line is, Your Honor,
18 I don't know because this was never raised in a time where we
19 could cross-examine the witness, and I certainly don't want to
14:18:06 20 do it with a paid professional witness like Mr. Tregillis, who,
21 you know, I'm ill-equipped to proceed on this now because of
22 how they've approached the issue.

23 And, you know, again, it's not a question of initial
24 relevance. It's just a lack of disclosure.

25 THE COURT: All right. Your exception is noted. I'm

1 going to allow him to testify on it, and, you know, if you have
2 specific objections that -- then you still may make them, but I
3 don't see in this slide presentation, you know, the type of
4 evasiveness that you suspect occurred. And just pretty much
5 straightforward information. And if it's contained in the
6 report and he's alluded to it in his report and you had the
7 opportunity to examine him on it in the report, then that's
8 where the disconnect is.

9 MR. ZEBRAK: But, Your Honor, the -- you know, the
10 issue is this is not in his report, these figures.

11 THE COURT: 6,734 plus 3,283 equals 10,000? That's
12 not in his report?

13 MR. ZEBRAK: Go ahead.

14 MR. OPPENHEIM: Your Honor --

15 THE COURT: Come to the podium.

16 MR. OPPENHEIM: Maybe it would be useful to have,
17 have Cox hand up to Your Honor the document that they believe
18 is in the report that supports this, because we're looking at
19 that document, and that document is not an analysis that's
20 remotely like this. And so -- and it's not a matter of
21 arithmetic, Your Honor. That's not what it is.

22 If, if we wanted to be able to figure out what it is
23 that --

24 THE COURT: What --

25 MR. OPPENHEIM: I'm on slide 21, just by way of

1 example.

2 THE COURT: Okay.

3 MR. OPPENHEIM: If we wanted to be able to figure
4 out, well, what was he including in each of these categories at
5 the bottom, in the 4,324, in the 2,409, and in the 871, so that
6 we could figure out whether he had done that, that analysis
7 correctly, that analysis would have to be in his report, and
8 it's not.

9 So we have no way of knowing what he was putting in
10 each of these three buckets. And if you look at the schedule,
11 he does try to, for lack of a better term, do some bucketizing,
12 but it's not of this number. It's of 2,200 works.

13 So we have no idea as they present this testimony
14 whether -- what the basis of it is, and so we've not had an
15 opportunity to, to examine it or cross-examine him on it, and
16 so if he wants to testify as to what's in the Schedule 6 of his
17 expert report, he can do that. He knows it's wrong. He didn't
18 amend the report or modify the report. But to now come forward
19 with a different analysis of a different list of works to us is
14:21:01 20 problematic.

21 So maybe they -- Cox could hand up, we don't have an
22 extra copy, a copy of the appendix to the report so Your Honor
23 could look at it while Mr. Jarchow is testifying.

24 THE COURT: Well, it kind of sounds to me like you
25 want a ruling before he testifies, huh?

1 MR. OPPENHEIM: No, I'm sorry. I think that
2 Mr. Tregillis is not the next witness. I think Mr. Jarchow is,
3 so we have a little bit of time. That's why I was suggesting
4 that process.

5 THE COURT: Oh, yeah, absolutely. And more
6 information is better.

7 MR. OPPENHEIM: And I'm told, just to be clear, our
8 objection is not to the top here. That's not a problem.

9 THE COURT: Right.

10 MR. OPPENHEIM: That's not a problem.

11 THE COURT: It's at the bottom, 4,324 and -- right.
12 Okay. All right, I'm happy to look at it. Let's --

13 MR. BUCHANAN: I'll just -- there's no dispute these
14 numbers are right and they come from the data, but --

15 THE COURT: Well, it's not in his report and he's
16 done a further analysis, I mean, you know, rightly or wrongly,
17 I've held the parties to what's in the reports --

18 MR. BUCHANAN: Right.

19 THE COURT: -- and what they testified to in the
14:22:07 20 deposition.

21 I think that's the way I've always done it, and -- so
22 if he's done a new analysis, then it's not coming in, and it's
23 improper for him to go back and change his opinion after the
24 depositions, after his report, and --

25 MR. BUCHANAN: But this isn't -- I just want to

1 finish with it. This isn't a changing of opinion. This is
2 just looking at the current works in suit, which were amended,
3 as you know, several times by the plaintiffs, and then he
4 tracks it.

5 And these numbers they don't dispute at the top,
6 right?

7 THE COURT: Right.

8 MR. BUCHANAN: And this is just a breakdown of those
9 that are just, you know, a sound recording with one track and
10 sound recordings with multiple tracks.

11 THE COURT: These are different numbers now, right,
12 than he had in his report?

13 MR. BUCHANAN: Well, they're coming from the updated
14 data that the plaintiffs did as they went along in amending
15 their complaint. So it's a moving target. They amended it
16 several times, dropping some off and whatever.

17 But there's no dispute about, you know, what they
18 are. It's made up --

19 THE COURT: Is that right, Mr. Zebrak? Do the
14:23:13 20 numbers -- is he adjusting to the different numbers of works
21 that are at issue in the case? Because that did change several
22 times.

23 MR. ZEBRAK: So, yes, Your Honor, the works did
24 change a few times. He hasn't updated this analysis, as far as
25 I'm aware, since his April report.

1 And the schedule, we have a copy of the binder --

2 THE COURT: Yeah, but then if you -- if you've looked
3 at this and you say, okay, we amended our numbers, and I can
4 see from this that he obviously has now taken our new numbers
5 and done the new math, where's the prejudice in that?

6 MR. ZEBRAK: But he's never done this math, to be
7 clear, Your Honor. He at most is --

8 THE COURT: If he's taking your new data and he's
9 using the same theory on how to identify the numbers, the same
10 equation, and he's putting in new numbers because you changed
11 the works in suit, then I don't see where the problem is.

12 MR. ZEBRAK: His initial analysis, which has never
13 been updated, was analysis that made no sense. It, it didn't
14 understand the nature of the infringement evidence. He
15 appeared to disavow --

16 THE COURT: So he's using a new formula. Is that
17 what you're saying?

18 MR. ZEBRAK: Well, certainly with respect to
19 identifying the works in the case. I don't, I don't know how
20 he arrives at his numbers. That's the -- and that's the issue
21 we have, is that because it was never disclosed.

22 THE COURT: Yeah.

23 MR. OPPENHEIM: So, Your Honor, here's the report. I
24 flagged -- sorry.

25 I flagged the schedule at issue and the page where it

1 shows the last number, and just for clarity sake, that schedule
2 is of 2,200-odd works. We never -- our claim was never limited
3 to 2,200-odd works. So it's not as though he did an analysis
4 of what we had at one point and then we changed it and he just
5 didn't amend.

6 I don't know why he did 2,200 works. I'm sure there
7 was some reason back then, but he did, and that wasn't -- so
8 it's not a matter of us changing our works in suit.

9 THE COURT: Okay. Thank you. That's important to
10 know. Okay.

11 All right. Let's get our jury, Joe, please.

12 NOTE: At this point, the jury returns to the
13 courtroom; whereupon, the case continues as follows:

14 JURY IN

15 THE COURT: All right. Please have a seat. Sorry
16 for the delay. We're working out here so you wouldn't have to
17 listen to that wonderful noise machine.

18 Next witness.

19 MS. GOLINVEAUX: Good afternoon, Your Honor. Cox
20 calls Paul Jarchow.

21 THE COURT: Okay. Please come forward, sir.

22 PAUL JOHN JARCHOW, DEFENDANTS' WITNESS, SWORN

23 THE COURT: All right. Good afternoon, sir. Please
24 proceed.

25 MS. GOLINVEAUX: Thank you, Your Honor.

1 DIRECT EXAMINATION

2 BY MS. GOLINVEAUX:

3 Q. Good afternoon, Mr. Jarchow.

4 A. Good afternoon.

5 Q. Could you please state your full name for the record.

6 A. Paul John Jarchow.

7 Q. And by whom are you employed?

8 A. Cox Communications, Incorporated.

9 Q. And how long have you worked for Cox?

14:27:30 10 A. About 24 years now.

11 Q. Briefly, sir, what is your educational background?

12 A. I have a Master's, Master's Degree in Information Decision
13 Systems.

14 Q. And what is your current position at Cox?

15 A. I am the director of information technology.

16 Q. And how long have you held that position?

17 A. Approximately three years.

18 Q. Before that, what was your title?

19 A. Manager of information decision systems.

14:27:56 20 Q. As director of information technology, what are your job
21 responsibilities?

22 A. I am responsible for the configuration of the ICOMS
23 billing system, which includes rates and services.

24 Q. And what was your role as senior manager of technology?

25 A. I did the exact same thing.

1 Q. Okay. You mentioned the ICOMS billing system. Can you
2 please explain for us what is the ICOMS billing system?

3 A. It's our subscriber management system. We use it to keep
4 track of all of our customers, their addresses, rates, and
5 services that they subscribe to.

6 Q. And all in all, how long have you been responsible for the
7 management and configuration of the ICOMS billing system?

8 A. Approximately 20 years.

9 Q. Mr. Jarchow, you mentioned that the ICOMS system maintains
14:29:00 10 subscriber management information. What, what sort of
11 subscriber information does ICOMS store?

12 A. We have names. We have addresses, the services that are
13 available for sale, rates for those services, payments, payment
14 information, Social Security numbers, etc.

15 Q. What information about customers' internet service is
16 stored in ICOMS, if any?

17 A. We maintain information about their data tier and their
18 speed as well as managed WiFi services that they may subscribe
19 to.

14:29:38 20 Q. Did you say managed WiFi services?

21 A. Yes.

22 Q. What is managed WiFi?

23 A. It's the ability for a customer to subscribe to a WiFi
24 service from Cox.

25 Q. Is managed WiFi public WiFi or secure WiFi?

1 A. It could be public WiFi, it could be secure WiFi, or both.

2 Q. Well, is there information in the ICOMS system from which
3 you could determine if a customer's managed WiFi service was
4 public WiFi or was part of their secure network?

5 A. No. We just sell the managed WiFi service.

6 Q. Mr. Jarchow, to what extent does ICOMS store subscribers'
7 addresses?

8 A. We maintain an address for every location that we serve.

9 Q. Would that include both residential and Cox Business
10 customers?

11 A. That would.

12 Q. To what extent does the ICOMS system distinguish between
13 residential and business customers?

14 A. We have a clear delineation between the bill-type code.
15 For the residential subscribers, we use the S bill type, and
16 for the business subscribers, we use the C bill type.

17 Q. And at what time in the account creation process does
18 ICOMS create a record of a subscriber's name?

19 A. When we acquire a customer and sell them services.

14:30:54 20 Q. Does ICOMS store that account name and address information
21 in the ordinary course of business?

22 A. It does.

23 Q. Does ICOMS system contain information that would show
24 whether a subscriber's internet service was used for public
25 WiFi?

1 A. It does not.

2 Q. Does ICOMS contain information that would show whether a
3 subscriber's internet service was limited to particular
4 categories of end users like employees, contractors, guests, or
5 the like?

6 A. It does not.

7 Q. In addition to ICOMS, does Cox also have other databases
8 and systems?

9 A. We have very many, many databases and systems, yes.

14:31:36 10 Q. Mr. Jarchow, to what extent do you have knowledge of Cox's
11 other databases and systems beyond ICOMS?

12 A. My primary job responsibilities are related to ICOMS. I
13 have one or two ancillary databases that I have access to.

14 Q. And, sir, are you personally aware of any database or
15 system at Cox with information about whether a subscriber uses
16 its Cox internet service for public WiFi versus for a secure
17 computer network or for both?

18 A. No, I do not.

19 Q. Mr. Jarchow, in connection with this lawsuit, were you
14:32:09 20 asked to retrieve information about certain subscribers from
21 the ICOMS system?

22 A. Yes.

23 Q. And how do you identify the subscribers whose information
24 you were asked to retrieve?

25 A. A list of account numbers was provided by Brent Beck, and

1 we took that list of the customers in question that may have
2 received a notice, and we ran that list against the ICOMS
3 database.

4 Q. And do you have an understanding of what those account
5 numbers referred to?

6 A. Yes. People that had received copyright notifications.

7 Q. And did you have an understanding of why you were being
8 asked to retrieve information about those accounts?

9 A. Yes. The court had ordered a request for data from ICOMS
10 related to how those customers were billed.

11 Q. Mr. Jarchow, what information were you asked to retrieve
12 about those subscribers' accounts?

13 A. We retrieved the site ID, the account number. We
14 retrieved customer names, addresses, their bill type. We
15 retrieved also monthly billing for those customers in net
16 across all of our categories of service from the periods 2012
17 through 2016.

18 Q. How did you go about retrieving that information?

19 A. Using the list provided by Mr. Beck, we -- I worked with
14:33:37 20 the -- our vendor, Netcracker. We went through an extensive
21 process to pull together logic and scripting that would pull in
22 all of the data elements that were required per the court order
23 for the extracted report.

24 Q. You mentioned Netcracker. What is Netcracker?

25 A. Netcracker is the software owner that we license ICOMS

1 from.

2 Q. Do you ordinarily work with Netcracker in retrieving
3 customer records like this?

4 A. I work with Netcracker on a regular basis.

5 Q. And in your experience, is that process accurate?

6 A. Very accurate.

7 Q. Mr. Jarchow, you should have a binder in front of you.

8 A. Yes, I did.

9 Q. If you could please look -- there should be three tabs in
10 the binder. Do you see that, sir?

11 A. I do.

12 Q. And would you please take a look at those three documents
13 and tell me, do you recognize those documents?

14 A. I do.

15 Q. What are they?

16 A. These are site IDs, account numbers, customer names,
17 customer addresses of our Cox Business subscribers that were
18 part of the original data extraction that we pulled for the
19 court, except for two customers that were left out per their
20 request.

21 Q. Without revealing their names, what type of businesses
22 were those two customers?

23 A. There was a hotel and a hospital.

24 Q. And do you have an understanding as to why their
25 information was left out?

1 A. Their -- they filed a request to, to be anonymous.

2 Q. And did you review that filing that they did?

3 A. I did.

4 Q. And did the filing say whether those two customers used
5 their Cox internet account for public WiFi or for their secured
6 computer systems?

7 A. The hotel filing indicated that they used the WiFi in both
8 a secured and public way. The hospital filing indicated that
9 their secure network was provided by another internet service
10 provider and their public WiFi was provided by Cox.

14:36:06

11 Q. And, sir, do the three reports in your binder, with the
12 exception of the two subscribers you just mentioned, list all
13 the businesses on the list of accounts that you were provided?

14 A. That is correct.

15 Q. And with those two exceptions, how can you tell that this
16 report lists all the Cox subscribers who are the subject of
17 plaintiffs' notices?

18 A. I've compared this to the original data extraction and
19 reviewed every account to make sure they were accurate.

14:36:37

20 Q. And do the three reports accurately reflect the name and
21 address of the Cox Business subscribers from the master ICOMS
22 report you supervised?

23 A. They do, yes.

24 MS. GOLINVEAUX: Okay. Your Honor, I'd move into
25 evidence DX 358, 359, and 360.

1 THE COURT: Any objection?

2 MR. GOULD: No objection.

3 THE COURT: Received.

4 MS. GOLINVEAUX: Your Honor, these lists were
5 designated as confidential pursuant to the protective order
6 because there's really no purpose to disclose this list of Cox
7 Business names. I would ask if the Court would consider
8 keeping these three documents under seal.

9 THE COURT: It's just the names?

14:37:14 10 MS. GOLINVEAUX: Yes, Your Honor.

11 THE COURT: All right. No. Your exception is noted,
12 though.

13 MS. GOLINVEAUX: Your Honor, the DX 358, 359, and 360
14 were submitted in electric form to the Court. We also move to
15 introduce 358A, 359A, and 360A, which are merely paper copies
16 of those electric documents.

17 THE COURT: All right. They'll be received.

18 BY MS. GOLINVEAUX:

19 Q. Mr. Jarchow, do you know how many commercial accounts are
14:37:49 20 listed in these three reports?

21 A. Approximately 2,800.

22 Q. And why are there three separate reports?

23 A. Due to the timing of notification. We needed to provide
24 them with different time. So the first report, etc., is based
25 on timing of notification.

1 Q. And what types of businesses, Mr. Jarchow, are reflected
2 on the three reports by category?

3 A. They're all, all types of businesses. There's businesses,
4 medium businesses. There's hospitals. There's firehouses.
5 There's government agencies. There's foundations. Any type of
6 business you could think of is in this report.

7 MS. GOLINVEAUX: Thank you, sir.

8 Your Honor, pass the witness.

9 THE COURT: All right. Cross-examination?

14:38:41 10 CROSS-EXAMINATION

11 BY MR. GOULD:

12 Q. Good afternoon, Mr. Jarchow. Nice to see you again.

13 A. Hello, Mr. Gould.

14 Q. You were asked to produce ICOMS billing and payment data
15 for approximately 58,000 customers who were identified in
16 plaintiffs' infringement notices, correct?

17 A. That's correct.

18 Q. And approximately 95 percent of those customers were
19 residential customers, correct?

14:39:11 20 A. That's correct.

21 Q. Roughly 5 percent were business customers?

22 A. Approximately, yes.

23 Q. And that 5 percent of business customers came to just
24 about 2,800? That's the 2,800-ish that you described, correct?

25 A. That's correct.

1 Q. And Cox hasn't provided the names of the residential
2 customers, correct?

3 A. It has not.

4 Q. You understand that the business customers were given an
5 opportunity to object in court to the disclosure of their
6 names?

7 A. Yes.

8 Q. And you mentioned, I think, two that you said did?

9 A. Yes, sir.

14:39:52 10 MR. GOULD: Could you pull up DX 358, please?

11 Please scroll to the top, please.

12 BY MR. GOULD:

13 Q. Mr. Jarchow, this is DX 358, which has the bulk of those
14 customers' names, correct?

15 A. Yes, sir.

16 Q. I think it was about 2,700 or so that were on this
17 particular spreadsheet, give or take.

18 A. Yes.

19 Q. Now, if we look at some of the names of the business
14:40:32 20 customers, No. 5 is Olympia Skate Center, and right below that
21 is a Computers & More, right? And you keep going down and you
22 can see there's a college, and one's a fire station.

23 If you keep scrolling down, towards the bottom,
24 Margaritas, let's see, line 21 says Margaritas Mexican Bar &
25 Grill. And right below that is Cars R Us.

1 Did I read those correctly?

2 A. That's what I'm reading, yes, sir.

3 MR. GOULD: If you could just click down another
4 page?

5 BY MR. GOULD:

6 Q. Let's take a look at some of the other names. There's a
7 couple of Starbucks, right?

8 A. Yes.

9 Q. And there's an art gallery, correct, at line 49?

14:41:27 10 A. Yes.

11 Q. Let's take a look at another page, okay? Line 79, there's
12 something called Crystal Chandelier, right? And then an
13 infirmary and a diner and a coffee shop, and then at 87, you
14 see Sal's Seafood and Chicken.

15 Did I read those correctly?

16 A. Yes, sir. And 86, Staybridge Suites.

17 Q. Let's take a look at another page. At line 103, you have
18 5 Minute Oil Change Shop. Below that is a barbershop, and then
19 at 106, there's a Pipes R Us Plumbing, correct?

14:42:09 20 A. Yes, sir.

21 Q. Okay. Let's take a look at another page. At the top,
22 you've got a nail and spa, right?

23 A. Yes, sir.

24 Q. And at 117, there's a restaurant and oyster bar?

25 A. And 116, Benchmark Communications.

1 Q. Yeah. And at 122, we have Cairo Cafe?

2 A. That's correct.

3 Q. There's a TGI Fridays right at the bottom?

4 A. Yes.

5 Q. Let's just look at one more page to get a sense here. At
6 155, you have Smooth Movers, correct?

7 A. That's correct.

8 Q. And 166, something called Underground Audio? Did I read
9 that correctly?

14:43:01 10 A. That's correct.

11 Q. And these are fairly representative of the types of
12 customers and names that are listed in these three exhibits,
13 correct?

14 A. In general, yes.

15 Q. And there's also a handful of hospitals, doctor's offices
16 or medical centers, right?

17 A. Doctors' offices, medical centers, library, government
18 facilities, yeah.

19 Q. Saw a couple of volunteer fire stations, correct? Sound
14:43:34 20 familiar? You've looked at these?

21 A. Yes.

22 Q. You understand, sir, that Cox has argued in this case that
23 it can't be expected to terminate Internet service of business
24 customers for copyright violations if those customers are
25 hospitals, police, fire, or other critical infrastructure?

1 MS. GOLINVEAUX: Objection, Your Honor. Scope.

2 MR. GOULD: Your Honor, this witness is listed on our
3 exhibit list as well.

4 THE COURT: Yeah, I'm going to allow the question.
5 Your exception is noted. Thank you.

6 BY MR. GOULD:

7 Q. Sir, do you understand that Cox has argued in this case
8 that it can't be expected to terminate internet service for
9 business customers for copyright violations if those customers
10 may include critical infrastructure or health care services?

11 A. I understand.

12 Q. And I think you testified that the ICOMS database from
13 which this information came doesn't actually tell Cox what the
14 customer uses that service for, correct?

15 A. That is correct.

16 Q. It could include a field here that says it's used for
17 WiFi, right?

18 A. Managed WiFi. If we sold them managed WiFi service.

19 Q. You could include a field that says this customer used our
20 service for WiFi, correct?

21 A. If we sold them managed WiFi service.

22 Q. But there's no way to distinguish based on the billing
23 records or the ICOMS database whether those WiFi users were
24 using some secured private network or a public WiFi network,
25 correct?

1 A. That is correct.

2 Q. And likewise, for a hospital client or a volunteer fire
3 station, there's similarly no way to tell on your end whether
4 the customer is using Cox's service for some secured private
5 network to, say, provide emergency services or in a lobby,
6 correct?

7 A. The ICOMS system does not have records that represent
8 secured or private or --

9 Q. Now, I've looked through these three exhibits. Would it
10 surprise you if I told you that of the 2,800 or so, there's by
11 name alone approximately 68 that appeared to potentially maybe
12 relate to some sort of health or infrastructure-type service?

13 A. Hard to say. I didn't count specific categories.

14 Q. But you looked through this whole list, and we've just
15 scanned through some pages, correct?

16 A. Yes. I've reviewed the entire list. I didn't
17 specifically count.

18 Q. Now, as the director of information technology, your job
19 duties focus on the technical support of the business systems
20 that Cox Communications uses to provide its services, correct?

21 A. I manage the configurations of the ICOMS billing database.

22 MR. GOULD: I'm sorry, I handed you the wrong
23 document. I apologize.

24 BY MR. GOULD:

25 Q. Sir, I want to show you a document and ask you if it

1 refreshes your recollection. If you look at the first sentence
2 of paragraph 2, does this refresh your recollection that your
3 current job duties focus on the technical support of the
4 business systems that Cox Communications uses to provide its
5 services?

6 A. The first sentence, but the second sentence, the primary
7 system I'm responsible for is ICOMS customer subscriber
8 management system, yes.

9 Q. Sir, you recall submitting a sworn declaration in this
10 case in which you testified that your current job duties focus
11 on the technical support of the business systems that Cox
12 Communications uses to provide its services?

13 A. Yes.

14 Q. And do you agree with that?

15 A. With the primary system, I'm responsible for it, being
16 ICOMS, yes.

17 Q. So I'm just asking you about the first sentence in your
18 sworn declaration. Your job duties focus on the technical
19 support of the business systems that Cox Communications uses to
20 provide its services. Is that your job duties or not?

21 A. Yes, sir.

22 Q. So we already talked about ICOMS, but given those job
23 duties, I think what you're saying is beyond ICOMS, you're also
24 not aware of any other databases at Cox that contain
25 information about whether a Cox Business customer at issue here

1 used their internet service to provide emergency services,
2 correct?

3 A. I don't manage any other systems at Cox. I communicate
4 with leaders that do manage those other systems, yes.

5 Q. You just don't know?

6 A. I don't know.

7 Q. And the same is true of whether any of these customers
8 provide critical infrastructure services through Cox's internet
9 services, correct?

14:48:41 10 A. That's not subject to my --

11 Q. I think you testified that you have reviewed an objection
12 to disclosure of the customer's name from a hospital to whom
13 Cox provides internet service, correct?

14 A. I have reviewed that.

15 Q. And I wasn't sure I understood what you said. I want to
16 make sure I got it correctly. I think you said that the
17 hospital reported that its internal secured network for
18 employees and health services was operated by someone different
19 than Cox, correct?

14:49:14 20 A. That is what was filed.

21 Q. And the hospital said that -- the only thing that the
22 hospital said in its statement was that it purchased internet
23 access that it used for public WiFi from Cox, correct?

24 A. That was what was in the filing, yes.

25 MR. GOULD: I have no further questions.

1 THE COURT: Any redirect?

2 MS. GOLINVEAUX: No, Your Honor.

3 THE COURT: All right. May Mr. Jarchow be excused?

4 MR. GOULD: Yes.

5 MS. GOLINVEAUX: Yes, Your Honor.

6 THE COURT: All right. All right. Thank you, sir.

7 You're excused at this time. Please don't discuss the

8 testimony you've given with anyone until our trial is over.

9 All right, sir?

14:49:50 10 THE WITNESS: Thank you.

11 THE COURT: All right. Have a good afternoon.

12 NOTE: The witness stood down.

13 THE COURT: All right. We have one matter to
14 resolve, so let's have you go sit comfortably in the jury room
15 instead of as a sidebar. So take a quick recess. Thank you.

16 NOTE: At this point, the jury leaves the courtroom;
17 whereupon, the case continues as follows:

18 JURY OUT

19 THE COURT: Okay. Well, I've looked at the Tregillis
14:51:05 20 expert report very quickly and then the exhibit that
21 Mr. Oppenheim forwarded up to me, which is a 41-page exhibit
22 which identifies -- what does it say, exhibit listed as the
23 tracks on Exhibit A and B and also appearing in independent
24 notice database.

25 So that's what I have. And I don't see in the report

1 where it's broken down at all, but perhaps you can tell me
2 where this all comes from.

3 MR. BUCHANAN: Your Honor, I --

4 THE COURT: First of all, what this has to do with
5 your demonstrative.

6 MR. BUCHANAN: Okay. I will show you from pages 9,
7 10, and 11. I think it is of his --

8 THE COURT: In your demonstratives?

9 MR. BUCHANAN: And page -- yeah, 9, 10, and 11 of his
14:52:12 10 reply report. If you can -- I've highlighted these pages, and
11 you can see what he's doing is he's calculating across the
12 board. Here's an excerpt from a -- sorry.

13 And I've highlighted that, and you can see that he's
14 breaking it down by musical composition, sound recordings, and
15 which, you know, have one, which have both. You can see the
16 columns. He does that throughout the report. Then there's
17 some text there. They had all this information before his
18 deposition.

19 And Dr. McCabe did this in his dataset. He did this
14:53:01 20 type of analysis of musical recordings, sound recordings, which
21 one had one, which had both. That's in his dataset that was
22 produced to Dr. Tregillis. You can see page after page where
23 he's going through various musical compositions and sound
24 recordings, and he's matching it up, whether it's one or both,
25 and they didn't ask him any questions about that in his

1 deposition.

2 MR. OPPENHEIM: I'm sorry, am I looking in the right
3 place? Can you just show me where you're looking here?

4 THE COURT: He's forwarded pages 9, 10, 11, and 31.

5 MR. ZEBRAK: Your Honor, the data in the report here,
6 these were specific little examples that were here for a
7 different -- a different purpose. It's not an overall analysis
8 of, you know, the works in the case, which is what they're now
9 doing in these summary slides in a way that we can't -- you
10 know, we can't follow, but I just -- it's the same point we
11 made before. It's just not, not disclosed in the report.

12 MR. OPPENHEIM: I still don't see on the pages where
13 those numbers appear.

14 MR. ZEBRAK: Oh, the numbers -- well, sorry.

15 THE COURT: I'm sorry. You don't have -- you want --

16 MR. OPPENHEIM: No, no, I have the report that
17 Mr. Buchanan was referring to.

18 THE COURT: Okay.

19 MR. OPPENHEIM: I don't see where in those pages
14:54:43 20 there's a reference to the numbers that are in this --

21 THE COURT: And he doesn't say that there are. He's
22 saying this is a -- these are examples of how Mr. Tregillis has
23 worked the numbers and for different purposes, which I don't
24 understand but maybe I'll get there.

25 MR. OPPENHEIM: I see that he has a number of

1 registrations broken out by sound recordings and musical
2 compositions in paragraph 27.

3 THE COURT: Right.

4 MR. OPPENHEIM: But the rest of the paragraphs are
5 about, as far as I can tell, numbers of notices by work, and it
6 doesn't have to do with overlap issues. So this is not what
7 they referred to as -- us to earlier. So maybe I'm missing
8 something in reading it quickly.

9 THE COURT: So your objection is to the overlapping
10 SR and MC? Is that what --
14:55:38

11 MR. OPPENHEIM: So there are two slides I'm looking
12 at here. One is 13, which has this 664 one-track, 789 multiple
13 tracks. I don't see any reference to that in the report. If
14 it's there and they can point me to it, great, but I don't see
15 it.

16 The other one is on the bottom of page 21, the 4,324,
17 2,409, and 871. I don't see that there, either. So I don't
18 know what falls into each of those buckets.

19 THE COURT: What -- you don't think that's in his
14:56:28 20 report?

21 MR. OPPENHEIM: Not that I'm seeing, Your Honor.
22 We've asked -- before we came to court after -- during lunch,
23 we asked them the questions, hoping we could resolve this.
24 They pointed us to the schedule, which I handed up to Your
25 Honor, which didn't do it for us. They're now pointing to

1 something else. I still don't see it.

2 If it's somewhere else, maybe it's okay, but we're
3 not -- we don't believe that Mr. Tregillis did this analysis,
4 and we are in no position to know what goes into each of those
5 buckets in his analysis to know whether he did it properly or
6 not.

7 THE COURT: How did he determine the 664 sound
8 recordings with one track versus 789 with --

9 MR. BUCHANAN: He went through the identical dataset
10 that Dr. McCabe used. He did it in his dataset, and he pulled
11 it out and it's --

12 THE COURT: That's from the 41-page exhibit from his
13 original report; is that right?

14 MR. BUCHANAN: This is -- you know, this is
15 basically -- so first of all, what I gave you was the same type
16 of analysis. He's going through and showing whether there's a
17 musical composition as well as a sound recording for those
18 particular works in suit.

19 Those are examples he goes through, and he goes
14:57:43 20 through -- this is the compilation of all of them. And had
21 they asked him about that -- they never asked him about any of
22 that, said, how did you do this? Where is this coming from?
23 What's it about? What's the purpose of this? What's the
24 relevance, and how many -- what's the total?

25 You know, and they never asked him about that.

1 THE COURT: Yeah, but how does he come up with, for
2 instance, on No. 13, 664 single tracks, 789 multiple tracks?
3 He didn't do that analysis before?

4 MR. BUCHANAN: No. It's in -- he did not break down
5 exactly like this, but what he did is he did examples of
6 various, you know, sound recordings and musical compositions
7 throughout his report, and he has references to them, I think,
8 even in the text that he talks about how many there are.

9 The point is that he took Dr. McCabe's dataset.
10 Dr. McCabe does in, you know, a huge dataset. He does it, and
11 he pulls it from there. They don't have any disagreement.

12 The whole point of this is just to show what he did
13 to come up with a dollar per work in suit, and the sound
14 recordings and musical composition, how he's given credit for
15 those that just have a sound recording and a musical
16 composition. That's all he's doing. He's breaking it out.

17 This is no great analysis. This is just counting,
18 and it's not disputed.

19 THE COURT: All right. Your exception is noted. I'm
14:59:03 20 going to allow him to use the additional numbers, and you try
21 and track it, cross-examine him. If this is erroneous, then
22 I'll strike it in hindsight.

23 MR. OPPENHEIM: Your Honor -- and I recognize your
24 ruling. Just so that there's a record on it, the, the pages
25 that Mr. Buchanan is pointing you to here are 9 and 10, with

1 these lists, have nothing to do with tracks or albums or
2 overlap between SRs and PAs. That has to do with the number of
3 notices.

4 THE COURT: I understand that. SRs versus the -- and
5 so it is a leap, but I'm going to -- I'm going to allow it.
6 Your exception is noted. If you think that the -- that the
7 numbers are wrong, then we can revisit it. But I just don't
8 think this is much of a leap in that, especially if it's
9 related to McGarty's testimony. I think it -- or McCabe's,
10 whatever. I think it's not out of bounds, so I'll allow it.

11 MR. OPPENHEIM: May I --

12 THE COURT: Yes, sir.

13 MR. OPPENHEIM: Understood. I'm not pushing back.
14 Your Honor, is it possible then that we can have Mr. Tregillis
15 testify tomorrow so we can have an opportunity to actually look
16 at these numbers and try to understand them before we have to
17 cross-examine him?

18 THE COURT: Who else do you have here that you can --

19 MR. BUCHANAN: He's next up. He's scheduled --

20 MR. ELKIN: We have a 16-minute video. We have
21 Dr. Almeroth and Mr. Mencher left in our case, plus just moving
22 in some miscellaneous exhibits. That's what our case is.

23 THE COURT: All right.

24 MR. ELKIN: So Mr. Tregillis is -- he's ready to go,
25 and --

1 THE COURT: Yeah, but I don't know enough to know
2 whether this is important or not. It's not hitting me as
3 critical data, but maybe I'm not appreciating something. So
4 let's put Almeroth up and, and give them a chance, and if we
5 get to Tregillis's direct, we'll see where we're going. But
6 let's give them the opportunity to understand where this data
7 came from.

8 What are you going to do that's going to give you
9 that information tonight?

15:01:35 10 MR. OPPENHEIM: I'm sorry, Your Honor, I was --

11 THE COURT: What are you going to do that's going to
12 give you the key to unlock these numbers tonight that -- where
13 a delay is -- and juggling witnesses is proper?

14 MR. OPPENHEIM: So, Your Honor, I'm going to ask
15 these very smart gentlemen who work with us here to try to go
16 back and re-create what he's done to see if we can come up with
17 those numbers. We don't know what he did. We're going to try
18 to figure it out.

19 I -- Your Honor, I also don't know whether it's
15:02:06 20 important, but this is a last-minute issue, and we're
21 certainly -- we're not prepared for it because it wasn't in the
22 deposition.

23 And the notion that we should have asked -- excuse
24 me -- in the reports. And the notion that Mr. Buchanan put
25 forward that we should have asked about it in depositions is

1 kind of humorous since how would we know to ask? It wasn't in
2 the report.

3 THE COURT: All right. Take a look at it tonight.

4 Let's go forward with Almeroth, who is not here,
5 and -- because he didn't expect to have to testify.

6 MS. GOLINVEAUX: Your Honor, he's across the street
7 at the hotel. I'll go get him.

8 THE COURT: Okay.

9 MS. GOLINVEAUX: Perhaps we could play the video now
10 in the meantime.

11 THE COURT: An excellent suggestion. Thank you.

12 All right. All right, Joe, let's get our jury back.

13 NOTE: At this point, the jury returns to the
14 courtroom; whereupon, the case continues as follows:

15 JURY IN

16 THE COURT: All right. Please be seated.

17 All right. I understand our next witness will be by
18 deposition and video.

19 Mr. Elkin?

15:04:03 20 MR. ELKIN: Yes, Your Honor. Good afternoon.

21 Defendants call Samuel Rubin, former employee at Stroz
22 Friedberg.

23 THE COURT: Okay.

24 NOTE: The testimony of SAMUEL RUBIN via video
25 deposition is played into the record as follows:

1 EXAMINATION

2 BY MR. BROPHY:

3 Q. Good morning, Mr. Rubin.

4 A. Good morning.

5 Q. As you've just heard, my name is Michael Brophy, and I
6 represent the defendant, Cox Communications, Inc., and CoxCom,
7 LLC, and I may in this deposition jointly refer to them as Cox.
8 Do you understand?

9 A. I do.

15:04:38 10 Q. Where are you currently employed?

11 A. I currently work at a company called The Crypsis Group,
12 C-r-y-p-s-i-s.

13 Q. And what is your title at The Crypsis Group?

14 A. Vice president.

15 Q. And when did you start working there?

16 A. September 1, 2017.

17 Q. And prior to working at The Crypsis Group, where did you
18 work?

19 A. Stroz Friedberg.

15:05:04 20 Q. Now, it is my understanding that you're testifying today
21 on behalf of Stroz Friedberg; is that correct?

22 A. I think that's correct, yes.

23 Q. When did you first work for Stroz Friedberg?

24 A. February 2003.

25 Q. And did you work there continually until you left in 2017?

1 A. Yes.

2 Q. Are you familiar with an entity called the Center for
3 Copyright Information?

4 A. Yes.

5 Q. And if I refer to that as CCI, you'll know what I'm
6 talking about?

7 A. Yes.

8 Q. So what is your understanding of how Stroz Friedberg
9 became engaged by CCI?

15:05:54 10 A. Stroz Friedberg was referred to Jill Lesser, who is the
11 representative from CCI, by one or more of both parties on the
12 content side, as well as certain participants on the internet
13 service provider side who were familiar with Stroz Friedberg
14 and our work. Its work.

15 Q. What is your knowledge of Stroz Friedberg's work for any
16 of the other entities listed under parties to the agreement?

17 A. I can say generally that Stroz Friedberg has worked on
18 behalf of parties on both the content owner representative
19 side, as well as the participating ISP side.

15:06:55 20 Q. What can you tell me about the methodology that Stroz
21 Friedberg initiated to get from the engagement stage to the
22 report stage?

23 A. I think that that's a broad question, and the, the answer
24 is best set forth in the documents that Stroz Friedberg
25 produced in connection with this deposition. At the highest

1 level, Stroz Friedberg conducted an assessment of the
2 methodologies that MarkMonitor undertook to identify infringing
3 works, to collect evidence related to those works, to search
4 for those infringing works being shared or downloaded on
5 peer-to-peer networks, and to notify the internet service
6 providers that were participating in the CAS, Copyright Alert
7 System.

8 Q. I'd like to mark this as Stroz Exhibit 5.

9 Mr. Rubin, do you recognize this exhibit by its
10 cover?

11 A. Yes.

12 Q. And what is this document?

13 A. This is Stroz Friedberg's report -- draft report, with the
14 title Independent Expert Assessment of MarkMonitor Antipiracy
15 Methodologies, dated October 31, 2012.

16 Q. And is this a document that you would have had a role in
17 creating?

18 A. Yes.

19 Q. Now, Stroz Friedberg was tasked with making enhancement
20 recommendations, correct?

21 A. Yes.

22 Q. Who at Stroz Friedberg was involved in formulating these
23 recommendations?

24 A. I was along with some of the same names that we've
25 mentioned here today: James Hung, Danny Lungstrom, and James

1 Aquilina, principally.

2 Q. Did any other entity or individual propose any changes to
3 Stroz Friedberg's recommendations after the first draft report
4 was circulated?

5 A. Not that I'm aware of. And I, I haven't done a
6 side-by-side comparison of all the drafts. I'm sure you or
7 your team will do that, but as I sit here right now, I don't
8 know.

9 Q. And at the time that you -- that Stroz Friedberg issued
10 its final report, you stood by the six listed enhancement
11 recommendations listed in the report?

12 A. Yes.

13 Q. If I could have you turn to page HL_186 to look at the
14 first recommendation?

15 A. Yes.

16 Q. And this is entitled Augment the File Identification Audit
17 Trail.

18 And this recommendation makes reference to a ripple
19 effect. What is meant by "ripple effect" in the context of
15:10:26 20 this recommendation?

21 A. The general point is that if a file is identified as an
22 infringing work, as a false positive, falsely identified, and
23 it's reflected in MarkMonitor's operational databases as such,
24 the rest of the process, which is very automated, would go on
25 to identify a file that is not infringing, as infringing, and

1 then generate notices to be sent to the participating ISPs of
2 false positive identified works.

3 So the ripple effect is essentially the downstream
4 consequences of the misidentification of a file as, as
5 infringing.

6 Q. And so circling back to what we talked about before, if
7 there was an error in verification via one of the components
8 such as Audible Magic, any errors with Audible Magic's
9 verification process would have a ripple effect throughout
10 MarkMonitor?

11 A. That's true. If it were not otherwise captured by one of
12 the controls in place.

13 Q. Now, I'd like you to, to focus at No. 2 now, where the
14 recommendation states: Deploy a high percentage of "verified"
15 infringing works to the collection agents.

16 A. Yes.

17 Q. Do you have an understanding as to why MarkMonitor
18 collected files that had not been verified as infringing?

19 A. It was generally done -- my understanding is that it was
20 an efficiency approach and one for scalability in that

21 essentially they could start collecting data almost
22 immediately, before -- one, one method would entail doing some
23 amount of kind of prescreening to sift through works to
24 identify which are true infringing copies and which are not and
25 then ceding the verified infringing work torrents in the

1 collection agency -- agents.

2 Another method would just be to use more of a, a --
3 cast a wider net and just sweep everything that was identified,
4 and then later verify those that were collected, and do that on
5 an ongoing basis. And that latter approach is the method that
6 MarkMonitor chose to, to use.

7 Q. In looks like the third sentence, it says: And though
8 there are subsequent steps in place to ensure notices are only
9 generated on verified infringing works, collection by the
10 agents of these non-infringing files introduces inefficiencies
11 into the process --

12 A. Sure.

13 Q. -- and increases the chances that notices will be
14 generated for non-infringing files.

15 A. Okay. Thank you.

16 And your question is how does it do that?

17 Q. In what way did it increase the chances that that would
18 happen?

19 A. Because a greater number of works in total, protected and
20 nonprotected, would be swept into the system, versus only
21 targeting verified infringing or protected works; thereby, the
22 entire population includes by virtue of the setup of the system
23 both protected and nonprotected works.

24 Q. And is -- if MarkMonitor had sent a notice for a, a
25 non-infringing file, would that be an example of a false

1 positive, as you've used that term?

2 A. Yes.

3 Q. And was it your -- was it Stroz Friedberg's recommendation
4 that if additional steps were taken to remove non-infringing
5 works from being swept into the system, it would decrease the
6 chances of false positives?

7 A. I think the recommendation was to increase -- to deploy a
8 higher percentage of verified infringing works. I think there
9 was an acknowledgement that without careful verification,
10 there's no way to ensure that you're only collecting infringing
11 works, and that this was a process designed for maximum
12 efficiency.

13 And so there was no -- there was no opinion or
14 recommendation that it was not a, a viable approach, but the
15 recommendation was to consider a method to increase the
16 percentage of verified works as related -- as compared to the
17 total population.

18 Q. Well, going back to the third sentence that I read a loud,
19 it ends with: That collection by these agents of these
20 non-infringing files introduces inefficiencies into the process
21 and increases the chance that notices will be generated for
22 non-infringing files.

23 And so my question for you is, are you -- was Stroz
24 Friedberg making this recommendation in part because they
25 wanted to decrease the chances that notices would be generated

1 for non-infringing files?

2 A. The recommendation was made as an overall system
3 enhancement, and part of the steps that would enhance it would
4 reduce the risk of error.

5 Q. Okay. And as stated here in this context, one of the
6 potential errors would be a notice generated for a
7 non-infringing file?

8 A. That's correct.

9 Q. Recommendation No. 3 references file identification names.

15:17:07 10 A. Sure.

11 Q. And I'm trying to understand if you could explain to me
12 why file identification names are relevant to the MarkMonitor
13 assessment program or the MarkMonitor program.

14 A. The point that Stroz Friedberg was making with this
15 recommendation was that the identification of infringing works
16 was limited to those that had a, a matching name, and that
17 it's, you know, possible, likely, and certainly the case that
18 many infringing works don't contain a name that directly
19 correlates to the content.

15:17:53 20 And so the point we're making is that by limiting the
21 program to only include those, they were probably missing some
22 infringement, infringement cases that if they augmented the
23 program, they could have captured.

24 Q. Do you know if MarkMonitor implemented any, any changes in
25 response to this recommendation?

1 A. I don't.

2 EXAMINATION

3 BY MS. MUSTICO:

4 Q. And I want to point your attention to Section No. 2,
5 summary of findings and recommendations, and the first bullet
6 point says: MarkMonitor's methodologies effectively identify
7 P2P online copyright infringers.

8 Do you see that?

9 A. Yes.

15:18:38 10 Q. Do you stand by this conclusion as accurate when it was
11 drafted?

12 A. Yes.

13 Q. Do you have any reason to believe that statement is
14 inaccurate?

15 A. No.

16 Q. Now?

17 A. No, I do not.

18 Q. Thank you. The second bullet says: MarkMonitor
19 methodologies are well developed and matured. Do you stand by
15:19:00 20 that statement as accurate when it was drafted?

21 A. Yes.

22 Q. Is there any reason to believe now, some years later, that
23 that statement is not accurate?

24 A. I have no reason to believe it isn't -- it is inaccurate.

25 Q. Okay. The third bullet says: MarkMonitor's evidence

1 collection in connection with P2P infringement is robust,
2 defensible, and will withstand adverse party scrutiny or
3 evidentiary challenges.

4 Do you believe that statement to have been accurate
5 when it was drafted?

6 A. Yes.

7 Q. Do you have any reason to believe that that statement is
8 no longer accurate?

9 A. No.

15:19:41 10 Q. The fourth bullet says: The methodologies include
11 appropriate checks and balances at key points in the work flow
12 to ensure accuracy.

13 Do you believe that statement or that conclusion was
14 accurate at the time it was drafted?

15 A. Yes.

16 Q. Any reason to believe that it is no longer accurate?

17 A. No.

18 Q. The fifth bullet point, page HL_172, says: The reporting
19 and notice-generating abilities allow MarkMonitor to accurately
15:20:17 20 report on identified infringers.

21 Do you see that?

22 A. Yes.

23 Q. Do you believe that conclusion to have been accurate when
24 this report was issued?

25 A. Yes.

1 Q. Do you have any reason to believe now that that statement
2 is no longer accurate?

3 A. No.

4 Q. And the last bullet in that section, which I think is
5 No. 6, says: The methodologies have a number of inherent and
6 added system redundancies designed to ensure that MarkMonitor
7 can provide continuous and consistent scanning.

8 Do you believe that statement is accurate -- was
9 accurate when it was drafted?

15:20:55 10 A. Yes.

11 Q. And do you have any reason to believe that it is no longer
12 accurate?

13 A. No.

14 Q. Do you believe that the MarkMonitor system to identify
15 infringing files on peer-to-peer networks that you reviewed as
16 part of the CCI engagement functioned as it was intended to at
17 the time that you reviewed it?

18 A. Yes.

19 Q. In Stroz Friedberg's analysis of MarkMonitor on behalf of
15:21:24 20 CCI, did you identify evidence that indicated that
21 MarkMonitor's system was producing false positives?

22 A VOICE: Object to the form.

23 THE WITNESS: No.

24 BY MS. MUSTICO:

25 Q. Did you identify -- excuse me.

1 Did Stroz Friedberg identify any evidence that
2 MarkMonitor's system committed errors in collecting case
3 packages?

4 A. I don't believe we identified any.

5 NOTE: End of video deposition.

6 THE COURT: All right. That concludes the video
7 deposition of Mr. Rubin.

8 All right. Next witness?

9 MS. LEIDEN: Thank you, Your Honor. Cox calls
10 Dr. Kevin Almeroth.

11 THE COURT: All right.

12 KEVIN CHRISTOPHER ALMEROOTH, PH.D., DEFENDANTS' WITNESS, SWORN

13 THE COURT: Good afternoon, Mr. Almeroth. Please
14 proceed.

15 MS. LEIDEN: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MS. LEIDEN:

18 Q. Good afternoon, Dr. Almeroth. Could you please state your
19 full name and introduce yourself to the jury.

15:23:14 20 A. Sure. My name is Kevin Almeroth, Kevin Christopher
21 Almeroth, and I'm a professor in the department of computer
22 science at the University of California in Santa Barbara.

23 Q. And, Dr. Almeroth, have you submitted written testimony in
24 this case in the capacity as an expert?

25 A. Yes, ma'am, I have.

1 Q. And generally speaking, can you tell the jury what you're
2 here to do today?

3 A. I'm here to offer rebuttal testimony and to describe
4 network monitoring in Cox's network and also to describe Cox's
5 abuse ticketing system.

6 Q. And, Dr. Almeroth, did you assist in preparing some slides
7 to illustrate your testimony today?

8 A. Yes, ma'am, I did.

9 Q. And do some of those slides summarize your background?

15:24:02 10 A. That's correct.

11 MS. LEIDEN: With permission, I'd like to hand the
12 witness a hard copy of the slides.

13 THE COURT: Certainly.

14 MS. LEIDEN: And permission to publish the slides on
15 the screen?

16 THE COURT: Any objection?

17 MR. ZEBRAK: No, Your Honor.

18 THE COURT: All right. They'll be received for
19 publication for demonstrative purposes.

15:24:27 20 MS. LEIDEN: Thank you.

21 BY MS. LEIDEN:

22 Q. And, Dr. Almeroth, do some of these slides summarize your
23 background?

24 A. Yes, ma'am.

25 Q. And I believe that you have requested to -- oh, you got

1 the clicker. Great.

2 Could you go through your background, please?

3 A. Certainly. So currently, as I said earlier, I'm a
4 professor in the department of computer science. I've been a
5 professor there since 1997. I started as an untenured
6 assistant professor, received tenure, was promoted to associate
7 professor, and eventually promoted to full professor, and along
8 the way, I have also served as the vice chair of the department
9 and also as an associate dean in the college of engineering.

15:25:13 10 Q. And generally speaking, what do you do as a professor at
11 UC Santa Barbara?

12 A. I do three things: I teach, I also do research, and then
13 I do service to the field, things like serving on editorial
14 boards, conferences, that kind of thing.

15 Q. And starting with the first, what types of classes do you
16 teach at UC Santa Barbara?

17 A. I teach both undergraduate courses and graduate courses to
18 master's and Ph.D. students, and I generally teach courses
19 about how the internet works, all sorts of details, protocols,
15:25:51 20 architecture for the internet, how it's structured, and how it
21 works.

22 Q. And at a high level, what types of topics are covered in
23 those classes?

24 A. We cover things like the protocols that are used in the
25 internet, the rules for how data is exchanged. We also cover

1 services on the internet like streaming media, peer-to-peer as
2 an example, how to do network monitoring and management, and
3 generally how the internet works.

4 Q. And you also mentioned research, I believe. What do you
5 do as a researcher at UC Santa Barbara?

6 A. The goal of a researcher and what I do in writing my lab
7 is to try and look at problems that exist in the internet,
8 opportunities for new services, and to try and solve those
9 problems, do experimentation, try and understand if those kinds
10 of systems will work, and then disseminate our results through
11 things like publications and the development of prototype
12 software systems.

13 Q. What do you mean by "prototype software systems"?

14 A. Part of what you have to do as a researcher is not just
15 propose an idea, but to evaluate it and show that it will work.
16 So, for example, an early project I did was essentially what
17 we, we understand TIVO to be, and so one of the things I wanted
18 to do in testing that over the internet was to create kind of a
19 prototype system to stream multimedia data over the internet
20 and then to be able to receive it and display it and listen to
21 it, and we wrote software to do that, and we put it on our web
22 page for others to use.

23 Q. And, Dr. Almeroth, could you briefly walk us through your
24 educational background?

25 A. Certainly. So I started at Georgia Tech in 1988 in the

1 computer science program and left in 1997, about nine years
2 later, and along the way, I earned a bachelor's degree, a
3 master's degree, and then eventually a Ph.D., all in computer
4 science.

5 Q. And have you been recognized at all for your work in the
6 area of computer networking?

7 A. Yes, ma'am, I have. The next slide identifies some awards
8 and honors, and they really break across the two areas of
9 teaching and research. I've been awarded the Department
10 Teaching Award about a half a dozen times in computer science
11 at UCSB, and I've also received the Campus Teaching Award.

12 And then for my research, there's a number of Best
13 Paper Awards. That's where you submit papers to a conference,
14 they're reviewed, and then of all the papers that are accepted,
15 they take the best one and recognize it.

16 There's also the second bullet here that I've been
17 recognized as a fellow of the IEEE. The IEEE is the Institute
18 of Electrical and Electronics Engineers, and I think you heard
19 testimony where a fellow is essentially the top 1 percent of
20 the membership for people who have been honored for lifetime
21 achievement.

22 Q. And at a high level, what's been the focus of your
23 research?

24 A. When I started at UCSB, the research that I was interested
25 in focusing on was really two different parts: This idea of

1 adding services to the internet to make it more useful, for
2 example, in the mid-'90s, when I first started doing research,
3 there was almost no streaming media. It was essentially all
4 web and e-mail. So I was interested in trying to add new
5 services as the internet grew.

6 The second theme was whenever you add those kinds of
7 new services and create traffic demands in the internet, it
8 puts a strain on the underlying infrastructure, the network
9 devices that move the data around the network, and so I've
10 undertaken research to try and develop support in the network
11 to help it go faster, to run more efficient.

12 And as part of that, you get to the third bullet on
13 the left side of the slide, which is I've done monitoring --
14 network monitoring and management research, trying to
15 understand what's happening in the network in the course of
16 providing these kinds of services. And so doing that kind of
17 monitoring tells us if it works, if it doesn't work, how to
18 improve it, that sort of thing.

19 Q. And have you done any research on peer-to-peer networks?

15:30:16 20 A. Yes, I have. I think you've heard testimony over the
21 course of the last couple weeks that as peer-to-peer networking
22 developed in the early 2000s, the late 1990s, it was seen as a
23 real revolution in the way networking was done. Instead of
24 always going to a server to get content, you could go and ask
25 peers for content that they might have.

1 And so researchers saw a lot of opportunity in that
2 kind of paradigm, and so I've written a number of papers that
3 talk about peer-to-peer and how that service can be used, for
4 example, by service providers to deliver new kinds of services.

5 Q. And has any of the research that you just mentioned been
6 published?

7 A. It has. There's a number of papers we've published in
8 conferences. My students love to publish their papers because
9 they get to go to interesting places and present that research.

15:31:12 10 Q. And have any of the -- those publications been
11 peer-reviewed journals?

12 A. Yes. Sort of pardon the pun, I'm peer-reviewed, but in
13 that case, you get other researchers to look at your work and
14 to determine if it's of acceptable quality, and so they'll pick
15 the top 10 or 15 or 20 percent of the papers that are submitted
16 and allow the mostly students to go and present those results.

17 Q. And, Dr. Almeroth, are you active in any industry working
18 groups?

19 A. Yes. So there's what's called the Internet Engineering
15:31:48 20 Task Force, that's the IETF. They're responsible for
21 developing and publishing most of the standards that people
22 might be aware of in the internet, things like HTTP for web
23 traffic delivery, SMTP for mail. I could go on with dozens and
24 dozens of acronyms for protocols that run in the internet.

25 And I've been active in the IETF. I've written

1 standards. I've collaborated with a number of other companies
2 who are interested in things like network management in the
3 IETF.

4 Q. And could you briefly just describe some of the industry
5 collaborations that you have on the right side of the slide
6 there?

7 A. Certainly. One of the themes of my research and one of
8 the reasons I went into academia, because I didn't just want to
9 sit in kind of the proverbial ivory tower and publish papers, I
10 wanted to see the work that I was doing make it out into
11 industry, into the internet, which is one of the reasons we
12 published some of the software that we had done.

13 But over the course of my research, working in the
14 IETF, I've had an opportunity to do research and collaborate
15 with companies, some of which you see here on the right. Some
16 of them are fairly well known. They make devices that run in
17 the internet. There's also companies that have built new
18 services on top of the internet, and I've collaborated with
19 them to see my research make it out into the real world.

20 Q. Did you provide an example of one of the more interesting
21 projects that you've worked on?

22 A. Yes. So you see about halfway down on the left side,
23 Lockheed Martin is mentioned. I was given an opportunity to
24 work on an advisory board in collaboration with the U.S. Air
25 Force to design the next generation internet for the military.

1 It was a fantastically interesting project in the
2 sense that it involved satellite-to-ground communication. It
3 involved significant security. A lot of the communications was
4 mobile communication in harsh environments where networks don't
5 always do particularly well.

6 So I was given an opportunity to apply some of the
7 research that I did to advance that project.

8 Q. And, Dr. Almeroth, have you had the occasion to serve as
9 an expert witness in the field of computer networking before?

15:34:12 10 A. Yes, ma'am, I have.

11 Q. How many times, if you can estimate?

12 A. I'd say it's about 60 or quite possibly a little bit more.

13 MS. LEIDEN: And I'd like to hand the witness a
14 binder, please.

15 BY MS. LEIDEN:

16 Q. And, Dr. Almeroth, when you have a moment to open that up,
17 if you could please turn to the first tab of your binder, which
18 is DX 169, and take a look at, please.

19 A. Yes, ma'am.

15:34:45 20 Q. And is that document a copy of your CV?

21 A. Yes, ma'am, it is.

22 Q. And are the things that we just talked about for the last
23 ten minutes or so listed or summarized in that CV?

24 A. That's correct. That's pretty much my life history since
25 I was an undergrad.

1 MS. LEIDEN: Your Honor, I would move to admit DX 169
2 into evidence.

3 THE COURT: Any objection?

4 MR. ZEBRAK: No objection, Your Honor.

5 THE COURT: It's received.

6 MS. LEIDEN: Thank you, Your Honor. And Cox would
7 offer Dr. Almeroth as an expert in the field of internet
8 architecture, network monitoring and management, and
9 peer-to-peer networks.

15:35:18 10 THE COURT: Any objection?

11 MR. ZEBRAK: No objection, Your Honor.

12 THE COURT: All right. He'll be received for those
13 purposes.

14 MS. LEIDEN: Thank you, Your Honor.

15 BY MS. LEIDEN:

16 Q. And you can set aside the big binder for now.

17 Dr. Almeroth, did you also assist in preparing some
18 slides that are going to outline the topics that you'll be
19 discussing today?

15:35:35 20 A. Yes, ma'am.

21 Q. And before we get into the substance of those opinions,
22 could you please describe what you were asked to do in this
23 case?

24 A. I was generally asked to respond to some of the testimony
25 and the expert reports and the opinions that have been offered

1 in this case and basically be able to provide a description of
2 the role of Cox's network in the internet and then also to
3 provide opinions as it relates to CATS, the Cox graduated
4 response system.

5 Q. And are you being compensated for your time as an expert
6 today?

7 A. Yes, ma'am.

8 Q. How much per hour?

9 A. \$650 per hour.

15:36:18 10 Q. And do you have an estimation of about how many hours
11 you've spent working on this case?

12 A. I would say about 150 hours.

13 Q. So around \$100,000, somewhere around there?

14 A. Yes, ma'am.

15 Q. And, Dr. Almeroth, could you please summarize the opinions
16 that you reached in this case?

17 A. Yes. I have a demonstrative on that. It's No. 5.

18 The first was that I developed opinions around the
19 technical background, Cox's role in the broader internet
15:36:50 20 ecosystem and the challenges of network monitoring. You've
21 heard the internet described as a network of networks, and so
22 I've prepared opinions trying to put Cox and other ISPs into
23 the context of the broader internet.

24 The second is to provide opinions on the use of
25 network management tools and the limitation of those tools to

1 monitor BitTorrent levels at the subscriber level.

2 And then the third is to evaluate evidence relating
3 to CAS and then Cox's CATS system and to respond to
4 Ms. Frederiksen-Cross's opinions relating to that evidence.

5 Q. And with respect to those three, could you summarize for
6 the jury the opinions that you did reach?

7 A. Yes. So there's basically two opinions in addition to
8 being able to describe how Cox fits into the internet, and the
9 first opinion is here on the screen. It's that there are
10 limitations to using network management tools to identify
11 infringing traffic or to manage peer-to-peer traffic.

12 And then the second is that Cox's graduated response
13 system was tougher than the industry standard, the Copyright
14 Alert System, and that both systems were designed to educate
15 subscribers and to mitigate infringement.

16 And I disagree with Ms. Frederiksen-Cross's testimony
17 that CATS could have been rewritten to terminate subscribers
18 after three strikes.

19 Q. And, Dr. Almeroth, as part of providing your opinions
20 relating to network management tools, did you develop an
21 understanding of Cox's role specifically within the internet?

22 A. Yes, ma'am, I did.

23 Q. And did you prepare some slides to illustrate that
24 understanding?

25 A. Yes, ma'am, I did.

1 Q. So just to start, how do home subscribers connect to the
2 internet?

3 A. So to kind of level set, I've got a demonstrative here
4 that shows a home network. It shows blue and tan packets
5 flowing around between different devices. Those represent
6 requests and responses, data that's being sent through the
7 network. And it all goes through kind of this one device that
8 I've circled and show as an example a Cox set top box, or cable
9 modem, and that cable modem from a user's perspective is
10 essentially the interface between that user's home and the rest
11 of the internet.

12 And so you can have something like a cable modem from
13 a cable service provider, an ISP like Cox. And then you can
14 have other ISPs, for example, Verizon is shown here, and it has
15 what's called a DSL modem.

16 The next slide then shows that you can have a variety
17 of end users, customers, businesses, other ISPs, that all are
18 customers of one or more ISPs. So these homes, these
19 businesses, these other ISPs have to be able to connect into
20 the internet at large.

21 Q. And does this slide illustrate what you referred to before
22 as the network of networks?

23 A. Yes. So you see the kinds of entities, people or
24 businesses that connect to the internet at the bottom, and then
25 the next click of the animation shows just how complex this can

1 get and how quickly it can get complex, but what you see is you
2 have other clouds on here, you have Cox in the upper left, you
3 have other ISPs.

4 All of those are different ways in which customers
5 and users and businesses can connect to the internet, and then
6 those networks have to connect to each other, so that if I, for
7 example, want to send an e-mail to my mother, who still uses
8 AOL, it would have to go onto one network and then transition
9 to a different network. And so all of the networks end up
10 getting connected together, and that's one of the reasons why
11 you call this a network of networks.

12 Now, at the top, there's a set of content providers,
13 things like Google and e-mail, Netflix, the new Disney+
14 streaming service. Those are businesses that provide content.
15 And so users who connect to the internet are able to make
16 requests through this network, through the network of networks,
17 and to request content from those kinds of content providers.

18 Q. And with respect to those content providers, is an ISP
19 like Cox the source of that content?

15:41:19 20 A. No. I think this slide pretty effectively illustrates
21 that example. Cox provides what's called transit. They don't
22 source or sync traffic. They don't generate the traffic. It's
23 the users who generate it. They don't provide the content. It
24 comes from other places: Facebook, Google, etc.

25 Q. And would this graphic also relate to how data is

1 transferred over peer-to-peer protocols?

2 A. Yes, ma'am. So there's what's called a client server
3 model, where you have clients and servers, and the clients make
4 requests of servers. They host the content.

5 The other model that we've all talked about or heard
6 over the last couple of weeks is peer-to-peer. So instead of
7 getting the content from the content providers, that content
8 can be provided by other peers. And that's an interesting
9 opportunity because it shifts the burden of distributing that
10 content from the content providers. And that's, for example,
11 some of the research I've looked at.

12 Q. So now that you've walked us through the broader picture,
13 I'd like to focus back on Cox's network specifically. So
14 what's contained in that cloud that's Cox?

15 A. Yes. The next demonstrative I have kind of expands out
16 the Cox network. Cox is what's considered to be a national
17 ISP. It has a very large geographic footprint, and you see
18 inside of this network, there's a number of kind of gray lines.
19 Those represent sort of the conduits through which data would
20 flow. So, for example, a series of pipes that would carry
21 data.

22 You also see kind of half-height blue cylinders.
23 Those represent network devices in the internet, including some
24 that are in Cox's network, that provide routing for data.

25 So just like in the mail analogy for the internet,

1 you put letters in a mailbox, they get delivered to the post
2 office, the post office has to make decisions on where that --
3 those letters will go. Routers and switches in the internet
4 perform the same kind of function. They look at the packets.
5 They look at data. It has information on where that data
6 should go, and it flows through the network choosing a path
7 using these routers and switches.

8 Q. And I believe you've referenced Cox's customers on the
9 bottom row there. What types of customers does Cox have?

15:43:51 10 A. Cox has home networks, individual subscribers. I think
11 there was testimony from Dr. Weber, she also indicated that
12 there were businesses who are subscribers to Cox. She
13 indicated multi-family residences, so, for example, apartments,
14 and then also that you can see towards the bottom, there's
15 another cloud called Pixius Communication. There's regional
16 ISPs who are also customers of Cox.

17 Q. Who is Pixius Communication?

18 A. Pixius Communication is what's called a regional ISP. It
19 has a much smaller geographic footprint than a national ISP
15:44:34 20 like Cox. And, in fact, I've got a slide that kind of expands
21 out and shows the cloud for Pixius Communication.

22 But other than its kind of size and geographic
23 footprint, it's very similar to Cox, and to the extent it has
24 downstream customers, single-family homes, businesses,
25 multi-family residences, Pixius has routers in its network, and

1 it essentially uses Cox as a gateway into the rest of the
2 internet.

3 As, as part of the network of networks, Pixius is
4 just a little bit smaller version of what Cox is.

5 Q. And so going back to Cox's network more broadly, can you
6 discuss how data is transmitted across the internet at a high
7 level?

8 A. Yes. So we're back to the main Cox slide. I've started
9 to animate it to show data flowing through this network. It's
10 a series of dots. Those dots are really packets, data packets.

11 And again, the analogy of the post office fits at
12 this kind of level. Just like we would take a letter or a
13 package and we would put a header on the outside, we'd put a
14 destination address, we'd put a return receipt address. Those
15 addresses have a structure to them; for example, you use a
16 two-state -- or a two-letter state abbreviation. That's by
17 convention, by protocol, by rule.

18 Packets that flow in the internet essentially do the
19 same thing. There are protocols and rules for how data is
20 divided up into these little segments and sent through the
21 network.

22 Q. And do ISPs like Cox have a role in that process?

23 A. They do. They're one of the network of networks, and so
24 for customers of Cox who send and receive data to the larger
25 internet, Cox will forward that data to the internet, and any

1 responses that come back, Cox will forward that on to its
2 customers.

3 Q. And you mentioned the analogy of envelopes and the postal
4 service. Does that analogy apply to how packets are
5 transmitting the network?

6 A. Yes. I think it generally applies to kind of give some
7 insight.

8 Q. Would that apply to the volume of data that's transmitting
9 the network?

15:46:47 10 A. No. The volume of data that exists on the internet today
11 is almost unimaginable. We're talking about routers that can
12 handle upwards of 10 million packets per second, 100 million
13 packets in one second. And so the volume of data that exists
14 in the current internet is huge.

15 It wasn't quite so high in, say, for example, the
16 mid '90s, but it's grown to be quite significant. In fact, I
17 have kind of a step-through of the animation to describe this
18 concept. You see a speedometer up here on the upper right.
19 Right now it's on the green. Everything is moving fairly
15:47:29 20 slowly.

21 The next step in the animation shows what it would
22 look like if it were yellow. This is the kind of evolution of
23 the internet that I was talking about when I was describing the
24 themes of my research at the beginning, that the volume of
25 traffic becomes much higher, there's more types of traffic, and

1 so the pipes, the connections between routers has to grow.

2 And this process has grown essentially exponentially
3 over the last couple of decades, and so the final part of this
4 animation shows more data going faster, requiring greater
5 capacity, and it creates a real monitoring and management
6 challenge in the internet as it existed in 2013 and 2014 and
7 today as well.

8 Q. And would you mind pausing just so we can give our eyes a
9 break? Thank you.

15:48:21 10 How do -- given all of that, how do ISPs like Cox
11 manage the amount of data that's transmitting their network?

12 A. The way that they -- that Cox would manage the amount of
13 data is that it would use network monitoring tools, tools that
14 could observe the traffic that was flowing through the network
15 and to be able to make decisions about what kind of traffic
16 that is.

17 Q. And, Dr. Almeroth, will you be providing opinions relating
18 to, to network monitoring today?

19 A. Yes, ma'am.

15:48:53 20 Q. How did you reach those opinions?

21 A. So I have a methodology for kind of what I looked at in
22 considering what Cox can do with respect to network monitoring.
23 The first point is to look at the scope and complexity of Cox's
24 network, some of which I've talked a little bit about, but I've
25 also reviewed information and talked to employees at Cox, some

1 of whom have testified here either live or by deposition, and
2 then combined that with an understanding of the kinds of tools
3 that were available to Cox and that Cox used in monitoring its
4 network. And so based on that, I formed opinions about what
5 Cox could do.

6 Q. And at a high level, what are network monitoring tools
7 like Procera?

8 A. If we go back to the slide that shows sort of Cox's
9 network, to answer that question, I've added three little boxes
10 labeled Data Centers and also Procera. Procera is a tool from
11 a company called Sandvine that performs network monitoring
12 functionality, and what's also important on this slide is the
13 location of the three Procera devices. They need to be in
14 strategic positions in the network so that they can see the
15 flow of data through the network.

16 So if data is to be monitored, if it's to be
17 analyzed, copies of that data have to be provided to the
18 software that will do an analysis of that data.

19 Q. And is it your understanding as what types of network
20 monitoring tools that Cox used?

21 A. Yes. So Sandvine's Procera was one of the tools that Cox
22 used.

23 Q. And what would Cox do with the information that it
24 received from Procera?

25 A. So Procera would provide information about the types of

1 packets, who sent and received those packets. It would create
2 statistics that could be used to understand what was happening
3 in Cox's network, at least from a high level. What it would
4 then do with those statistics is to try and do things like
5 capacity planning.

6 So there was testimony by videotape of a gentleman
7 from inCode, and he testified in the video about receiving
8 information from a tool like Procera, plugging it into kind of
9 a forecasting system, and then providing feedback to Cox about
10 how the volume and type of traffic in Cox's network might
11 evolve over a period of time. So those are the kinds of things
12 that Cox could do with its monitoring tools.

13 Q. And you have Traffic Monitoring there on the top. What
14 types of traffic can Procera monitor?

15 A. Procera can look at the headers of a protocol and look at,
16 for example, what's called a port number. Some port number are
17 reserved for particular applications, so, for example, Port 80
18 would be for web traffic, and so Procera could look at these
19 port numbers and determine what kinds of applications the port
20 numbers relate to.

21 So to the extent you have a set of ports that are
22 used for an application, Procera can collect statistics and
23 provide reports based on that kind of information.

24 Q. What would be some examples of those types of
25 applications?

1 A. Web traffic, streaming media traffic, peer-to-peer
2 traffic, those kinds of applications.

3 Q. You mentioned peer-to-peer. Could Procera be used to
4 monitor the amount of BitTorrent traffic that a specific Cox
5 subscriber uses on a particular day?

6 A. Yes. Procera would be able to perform that kind of
7 monitoring and to provide statistics at least about the fact
8 that it was BitTorrent traffic and do that on a per subscriber
9 basis.

15:52:52 10 Q. How would it do that?

11 A. Again, it would get copies of packets that were sent
12 across Cox's network and that were provided to the Procera
13 devices for processing, and it would be able to analyze those
14 headers and create the statistics about the types of traffic.

15 Q. Are there -- are there limits on what Cox could do with
16 that functionality of Procera?

17 A. Yes, ma'am, there are.

18 Q. What are those limits?

19 A. So the next slide talks about what some of these limits
15:53:20 20 would be with respect to network monitoring tools, and I have
21 three of them. The first is that Cox can't determine the
22 content of BitTorrent traffic. Much of the BitTorrent traffic
23 is encrypted, and so even if you look into the payloads of
24 traffic, you can't really determine what types of files there
25 are, in particular if it's encrypted. So the most you can

1 really do is determine that it's of an application type that's
2 BitTorrent or that's peer-to-peer.

3 The second point is that Cox can't determine whether
4 BitTorrent traffic is infringing. So setting aside the fact
5 that it's encrypted, if Cox could look at that traffic, it
6 isn't able to determine whether or not it's infringing. Cox
7 doesn't have the kinds of hashes, it doesn't have the kinds of
8 information that you've heard testimony about that's used in
9 this particular case.

15:54:17 10 MR. ZEBRAK: Objection.

11 THE WITNESS: The second point around Cox not being
12 able to determine whether BitTorrent traffic is infringing, I
13 mean, there is the exchange of copyrighted information.
14 There's also the exchange of information that's not copyrighted
15 or where the copyright owner allows that information to be
16 exchanged.

17 MR. ZEBRAK: Objection, Your Honor.

18 THE COURT: I'm sorry?

19 MR. ZEBRAK: Objection, Your Honor. Lack of
15:54:40 20 foundation for this. He's speculating about infringement
21 issues.

22 THE COURT: Sustained. Lay a foundation. Go ahead.

23 MS. LEIDEN: Thank you, Your Honor.

24 BY MS. LEIDEN:

25 Q. Dr. Almeroth, as part of your research and work in

1 peer-to-peer traffic, have you done any research as to
2 legitimate purposes, uses of peer-to-peer networks?

3 A. Yes, ma'am. I've published a number of papers that talk
4 about peer-to-peer traffic, talk about the ways in which
5 peer-to-peer can be used for legitimate purposes to develop new
6 services. For example, content providers who own content can
7 use peer-to-peer to distribute content through a peer-to-peer
8 network, and there's reasons why even someone who owns a
9 copyright would want to use a peer-to-peer network to
10 distribute their content.

15:55:34

11 THE COURT: Go ahead. You may proceed.

12 MS. LEIDEN: Thank you.

13 BY MS. LEIDEN:

14 Q. Dr. Almeroth, was there another opinion that you had with
15 respect to the limitations on using network monitoring tools?

16 A. Yes. There's this concept of net neutrality, and the
17 concept of net neutrality is inconsistent with this concept of
18 blocking peer-to-peer traffic. So, again, even to the extent
19 that Cox had the ability to look at encrypted traffic, if Cox
20 had the ability to determine that that content was copyrighted,
21 that it was copyright infringement, the concept of net
22 neutrality would really prohibit Cox from taking any particular
23 role in managing that network traffic.

15:56:06

24 And just to be clear, as I pointed out in the first
25 two bullets, Cox doesn't have those capabilities. I mean,

1 that's the whole point of encryption is so that people who see
2 your packets can't tell what you're sending.

3 Q. And from a technical perspective, why might blocking
4 peer-to-peer traffic be inconsistent with the concept of net
5 neutrality?

6 A. So net neutrality is this idea in the internet where
7 traffic from different providers should be treated the same,
8 and the concept of net neutrality was put in place to keep
9 traffic on the internet flowing, to make it a fair place for
10 ISPs to exchange traffic.

15:57:09

11 There's a good example. If Google gets very big,
12 which it is, and it decided that somebody was trying to start a
13 new search engine that would compete with Google, Google is so
14 big, they could go to ISPs and say: We will pay you money not
15 to deliver the traffic of this new search engine, and they can
16 thwart competition in the marketplace by exerting undue
17 influence on whether or not their packets versus the packets
18 and traffic of another competitor flow through the network.

19 So the idea of net neutrality is that the traffic in
20 the network should be unencumbered, that it shouldn't have
21 restrictions on it as it flow through the network.

15:57:51

22 Q. And briefly going back to the second point there, where
23 you said Cox cannot determine whether the traffic is
24 infringing, and I believe you had said that you had actually
25 conducted research on legitimate uses of BitTorrent; is that

1 correct?

2 A. Yes, ma'am.

3 Q. And do you have a slide that illustrates that in part?

4 A. I do. The next slide -- there's testimony and papers that
5 identify legitimate uses of peer-to-peer. I guess I'm touting
6 some of my own work here, but sometimes that's what happens.

7 A student of mine wrote a paper called "Pixie," and
8 we were looking to support the efficient peer exchange of
9 content and to use peer-to-peer networks on behalf of content
10 providers to enable new kinds of services.

15:58:40

11 As an example, there's also been testimony. One good
12 example is what's happened with NASA. NASA generates a huge
13 volume of traffic, satellite images, images from telescopes,
14 including the Hubble telescope, and as a government agency,
15 NASA doesn't have the infrastructure to make a petabyte's worth
16 of data, billions and trillions and quadrillion bytes of data
17 available from all of the different missions. And so NASA uses
18 BitTorrent for the exchange of that information, and you heard
19 testimony on that earlier this week.

15:59:21

20 There's other instances, too. There's Linux is an
21 operating system. Updates to the Linux operating system are
22 distributed using BitTorrent and peer-to-peer file sharing
23 protocols, and a number of witnesses have testified to that as
24 well.

25 So kind of in this time frame of 2013 to 2014, there

1 were a significant number of legitimate uses of BitTorrent, and
2 if Cox had attempted to block that traffic, it first of all
3 wouldn't be able to tell what was infringing, and it would be
4 inappropriate for them to block that traffic according to net
5 neutrality.

6 Q. And, Dr. Almeroth, did you come to any conclusion with
7 respect to Cox's use of network monitoring tools?

8 A. Yes.

9 Q. What were those conclusions?

16:00:04 10 A. Cox was able to use its monitoring tools to determine
11 types of applications, who was sending and receiving data, what
12 times of day, but beyond those kinds of statistics, Cox wasn't
13 in a position to use that kind of data in any meaningful way as
14 it relates to monitoring peer-to-peer traffic.

15 THE COURT: Is this is a good time for a break now,
16 or do you have a final couple of --

17 MS. LEIDEN: I have two more questions and then it
18 would be a natural break.

19 THE COURT: Please. All right, great. Go ahead.

16:00:38 20 BY MS. LEIDEN:

21 Q. Dr. Almeroth, do you have an understanding of whether Cox
22 used the information that it could obtain from Procera about
23 the volume of BitTorrent traffic in relation to processing
24 copyright notices?

25 A. I do. The understanding I have is that they didn't need

1 to use Procera because they accepted the copyright notices as
2 being accurate. And so there wasn't a need as part of
3 receiving these copyright notices for them to do any kind of
4 confirmation that the information in those notices were
5 correct. They simply assumed that they were correct.

6 MS. LEIDEN: Thank you. This would be a good time
7 for a break.

8 THE COURT: All right. Thank you.

9 All right. Let's take our mid-afternoon break and
10 take 15 minutes, and we'll come back and continue.

11 Thank you. You're excused.

12 NOTE: At this point, the jury leaves the courtroom;
13 whereupon, the case continues as follows:

14 JURY OUT

15 THE COURT: All right. Anything before we break?

16 MS. LEIDEN: No, Your Honor.

17 THE COURT: All right. Then let's take 15 minutes.
18 We're in recess.

19 NOTE: At this point a recess is taken; at the
20 conclusion of which the case continues in the absence of the
21 jury as follow:

22 JURY OUT

23 THE COURT: Ready for our jury?

24 MS. LEIDEN: Yes, Your Honor.

25 MR. ZEBRAK: Yes, Your Honor.

1 THE COURT: All right. Joe, let's get the jury,
2 please.

3 NOTE: At this point the jury returns to the
4 courtroom; whereupon the case continues as follows:

5 JURY IN

6 THE COURT: All right. Please have a seat.
7 Please continue.

8 MS. LEIDEN: Thank you, Your Honor.

9 BY MS. LEIDEN: (Continuing)

16:23:24 10 Q. Welcome back, Dr. Almeroth.

11 A. Thank you.

12 Q. I believe in the beginning of your testimony today you
13 mentioned that you were also here to rebut portions of the
14 testimony of Barbara Frederiksen-Cross; is that right?

15 A. Yes, ma'am.

16 Q. And did you have the opportunity to observe
17 Ms. Frederiksen-Cross' testimony in court a few weeks ago?

18 A. Yes, ma'am.

19 Q. And just to clarify, are you going to be discussing or
16:23:47 20 evaluating everything she said?

21 A. No, just one particular portion of her testimony.

22 Q. And could you please explain what portion of
23 Ms. Frederiksen-Cross' testimony that you evaluated.

24 A. Yes. So I've put it up on the screen. It's from the
25 trial when she was asked questions about the Cox CATS system.

1 And she described that it was operated by Cox.

2 And she was asked the question: So could Cox have
3 programmed this, let's say, to have three strikes and then
4 termination, for example?

5 And she responded: But Cox could have programmed the
6 system to do whatever they wanted to program the system to do.
7 I mean, this is just -- the programmers wrote the code
8 initially to apply these actions and Cox chose the actions.
9 And so whatever they chose, you know, one strike, two strikes,
10 three strikes, ten strikes, that's up to what Cox decided to
11 do.

12 Q. And in addition to that testimony, did you have the
13 opportunity to either see in person or review other trial
14 testimony and documents relating to the CATS system and the
15 Copyright Alert System?

16 A. Yes, ma'am, I did. And I have a slide on that. There was
17 testimony from Mr. Marks from the RIAA about CAS. There was
18 testimony from Mr. McMullan at the Universal Music Group also
19 about CAS.

16:25:22 20 And then Mr. Carothers from Cox testified about CATS,
21 the Cox graduated response system, because he invented it and
22 wrote the code for it.

23 Q. And on the left side that you have, there are some
24 documents there. Could you briefly describe the types of
25 documents that you reviewed with respect to these opinions.

1 A. Yes. There is a memo of understanding, an MOU, describing
2 CAS. There is information from the Center for Copyright
3 Information that ran CAS.

4 There is information about CATS, including its
5 customer safety and abuse operations.

6 And then there was also the Stroz Friedberg reports
7 describing what the different ISPs were doing with respect to
8 CAS.

9 Q. And, Dr. Almeroth, how did you go about forming an opinion
10 in response to the evidence and the testimony that you reviewed
11 and heard?

12 A. So the methodology for my opinions here are basically to
13 look at that information, to look at the information regarding
14 CATS, which was Cox's graduated response. And then to look at
15 the industry standard that had been agreed to by rights holders
16 and some of the largest ISPs called CAS, the Copyright Alert
17 System.

18 Q. And did you form an opinion in response to the testimony
19 and evidence that you saw and read?

16:26:48 20 A. Yes, ma'am, I did.

21 Q. What is that opinion?

22 A. The opinion is that Ms. Frederiksen-Cross' testimony that
23 Cox could have designated the CATS system to do anything,
24 including the three strikes and terminate, failed to consider
25 some important evidence and what these systems were trying to

1 do.

2 Really, the first point is that Cox has a role as an
3 ISP in the broader context of the Internet, as I described
4 earlier, that Internet ecosystem or network of networks. And
5 in that context, Cox has more than just residential subscribers
6 as customers. It has businesses and other ISPs as well.

7 And then the second point is that the industry
8 standard, this Copyright Alert System, was focused on education
9 and engagement as a way for providing mitigation of copyright
10 infringement. But the CAS system didn't require termination as
11 part of the MOU that had been agreed to.

12 Q. And starting with the first bullet on your slide there,
13 why is it your opinion that Ms. Frederiksen-Cross should have
14 considered Cox's role in the broader context of the Internet?

15 A. Yes. So the next slide is one that I showed earlier with
16 Pixius Communications as a regional ISP. That is one of the
17 regional ISPs that had received infringement notices from the
18 RIAA. And the idea that you could program CATS with, for
19 example, the three strikes and then terminate, what that would
20 mean is if some of the customers of Pixius Communication were
21 using peer-to-peer and they were terminated, that wouldn't just
22 be those customers on that ISP. That would be terminating all
23 of the ISP. That's what Ms. Frederiksen-Cross' suggestion
24 would have as an implication for a Cox customer that's a
25 regional ISP.

1 MR. ZEBRAK: Objection. Your Honor, may we have a
2 sidebar?

3 THE COURT: Yes, sir.

4 NOTE: A sidebar discussion is had between the Court
5 and counsel out of the hearing of the jury as follows:

6 AT SIDEBAR

7 THE COURT: Yes, sir.

8 MR. ZEBRAK: Your Honor, Barbara Frederiksen-Cross at
9 the tail-end of her testimony spent a few moments explaining
16:29:18 10 how the CATS system operated. And she merely -- in the portion
11 they're quoting, merely explained that Cox controls how to
12 program CATS, its functionality.

13 And they are now kind of lopping onto her an opinion
14 she hasn't offered, saying that -- almost as if Cox should have
15 terminated its whole ISP just based on three notices. It is
16 very misleading. And I have been trying to give a lot of
17 leeway on this, but -- let me -- let me stop there.

18 THE COURT: Okay.

19 MS. LEIDEN: She was asked -- she did testify rather
16:29:51 20 at length about the CATS system and how it was designed
21 throughout her testimony. And she was specifically asked the
22 question: Could Cox have programmed CATS to terminate
23 subscribers after three strikes? And she said: Yes.

24 She also -- I recognize she said it could terminate
25 after any number of strikes, but the question was asked, three

1 strikes. And this is well within Dr. Almeroth's expert report.

2 THE COURT: Yeah, I think it is. So your exception
3 is noted. I am going to allow it.

4 NOTE: The sidebar discussion is concluded; whereupon
5 the case continues before the jury as follows:

6 BEFORE THE JURY

7 THE COURT: All right. Please proceed.

8 MS. LEIDEN: Thank you.

9 By MS. LEIDEN: (Continuing)

16:30:43 10 Q. Dr. Almeroth, I believe you were just referring to Pixius
11 Communication. What would be the consequence of terminating
12 the Internet service of a regional ISP like Pixius
13 Communication?

14 A. If Pixius -- if Pixius Communication were terminated, its
15 connection to the Internet that you see here at the top through
16 Cox and onto the rest of the Internet would also be terminated.
17 Meaning all of its customers -- or none of its customers would
18 be able to reach the Internet for any kind of service. Whether
19 those customers are businesses or individuals or public safety
16:31:20 20 organizations, they would not be able to reach the Internet at
21 all.

22 Q. And going back to your discussion of what you believe that
23 Ms. Frederiksen-Cross did not consider, why did you consider
24 the Copyright Alert System in forming your opinions?

25 A. The Copyright Alert System was an industry system that had

1 been agreed to by content owners here on the left and some of
2 the largest ISPs. And as such, it was really a good basis for
3 comparison against what Cox was doing with its graduated
4 response.

5 Q. And before this case, had you ever heard of the Copyright
6 Alert System?

7 A. I had not.

8 Q. Had you ever looked into why it was established?

9 A. No.

16:32:13 10 Q. And had you looked into why -- or excuse me -- into the
11 circumstances of how the memorandum of understanding was
12 negotiated?

13 A. No.

14 Q. But you do have an understanding today based on the
15 documents that you had put on the slide previous as to what the
16 Copyright Alert System is, correct?

17 A. Yes, ma'am, I do.

18 Q. And in the context of the Copyright Alert System, do you
19 have an understanding of how copyright notices were handled?

16:32:38 20 A. Yes, ma'am, I do.

21 Q. Could you explain that to the jury.

22 A. Sure. I have another slide here that shows the CAS
23 graduated response system here on the left, which was the
24 subject of that industry standard in the MOU. And it
25 essentially describes in that document a set of responses 1

1 through 6.

2 And you see here what's described, you would start
3 with e-mail warnings, and then click-through messages, and then
4 ultimately at offense five and six there were temporary
5 restrictions.

6 And in the CAS graduated response system, there would
7 be one alert sent per week. At that point, once that had
8 happened, then nothing else happened after that. And you see
9 testimony here describing that after that sixth alert, nothing
10 happens. There is no requirement for termination or
11 consideration for termination, for example.

12 Q. And in your analysis of that, did that differ from Cox's
13 graduated response?

14 A. Yes. So I think the witnesses and the testimony over the
15 last couple weeks, including from Mr. Carothers, have described
16 the Cox graduated response system in a fair amount of detail.
17 And it had that first step, the hold for more, then there was a
18 series of e-mail warnings.

19 Now, you will notice that in the Cox graduated
16:34:05 20 response system, those e-mail warnings, and working through the
21 offenses second through seventh, happens one e-mail sent per
22 day. As compared to CAS and one sent per week.

23 And then you get into the escalating steps of
24 suspension and limited warning pages, suspension and required
25 to call a support technician, and then suspension and required

1 to call a specialized technician, and then, eventually,
2 consideration for termination.

3 Q. And what was your conclusion, if any, on the comparison
4 between the two systems?

5 A. Well, when you compare the two systems, including the fact
6 that CAS didn't have further action after that sixth offense, I
7 felt that both systems were intended to be educational, and
8 that the Cox graduated response system had greater restrictions
9 than what CAS had.

16:35:02 10 Q. And did you form a conclusion regarding the testimony and
11 evidence that you just summarized regarding CAS and CATS with
12 respect to Ms. Frederiksen-Cross' testimony?

13 A. Yes.

14 Q. What is that conclusion?

15 A. That I believe Ms. Frederiksen-Cross should have
16 considered CAS as a benchmark for what the industry had
17 negotiated and agreed to in her assessment of Cox's graduated
18 response.

19 Q. Dr. Almeroth, do you agree with Ms. Frederiksen-Cross'
16:35:36 20 testimony that Cox -- that CATS, excuse me, could have been
21 programmed to do anything?

22 A. That's a difficult question to answer. On the one hand,
23 computer programming is very flexible. You could have a
24 computer program and write a computer program to do just about
25 anything, but what you have to consider is the education and

1 engagement goals of what CATS was designed for.

2 And so, if that's the kind of system you're trying to
3 implement, then that constrains what you can do with the
4 application. It means you can't really just do anything if you
5 are trying to meet those goals.

6 MS. LEIDEN: Thank you very much.

7 Pass the witness.

8 THE COURT: Cross-examination.

9 MR. ZEBRAK: Thank you, Your Honor, yes.

16:36:44 10 CROSS-EXAMINATION

11 BY MR. ZEBRAK:

12 Q. Nice to see you again, Dr. Almeroth.

13 A. Nice to see you, sir.

14 Q. You're not testifying today as a legal expert, are you?

15 A. No, sir, I am not.

16 Q. You're not giving a legal opinion on net neutrality, are
17 you?

18 A. No, sir, I am not.

19 Q. And by the same token, I take that to mean that you're not
16:37:43 20 giving a legal opinion on how ISPs are permitted to respond or
21 not respond to infringement notices, correct?

22 A. That's correct, yes, sir.

23 Q. Now, do you recall discussing net neutrality during your
24 testimony a little while ago?

25 A. Yes, sir.

1 Q. And nothing about net neutrality limits how ISPs can
2 receive infringement notices, correct?

3 A. No, sir, I don't believe so.

4 Q. And likewise, nothing about net neutrality limits how ISPs
5 respond to infringement notices, correct?

6 Let me clarify that actually. Nothing about net
7 neutrality, in your non-legal view of it, prohibits an ISP from
8 suspending a customer who is using the Internet service for
9 infringement, correct?

16:38:47 10 A. That's correct. When it comes to suspension, an ISP
11 should be able to suspend a user.

12 Q. And likewise, you're not here today saying that Cox was
13 prohibited from terminating the accounts of customers that it
14 realized were engaging in repeat infringement, correct?

15 A. That's correct.

16 Q. And even let's just take a step back on net neutrality for
17 a moment so there's no confusion about it.

18 Do you recall the year it was that the FCC fined
19 Comcast for throttling BitTorrent traffic?

16:39:25 20 A. I don't remember the year. My recollection is that it was
21 before the claim period here.

22 Q. Are you familiar with whether the D.C. Circuit told the
23 FCC that it did not have the authority to prevent Comcast from
24 throttling?

25 A. Yes, there were quite a number of decisions on the legal

1 level that created a fair amount of confusion as to what ISPs
2 could do with respect to net neutrality.

3 Q. Would it surprise you if I told you that it was in 2011
4 that the D.C. Circuit told Comcast -- excuse me, told the FCC
5 that it couldn't prohibit an ISP from throttling BitTorrent
6 traffic?

7 A. That seems to be consistent with my recollection.

8 Q. You talked a lot about Barbara Frederiksen-Cross in
9 your -- in your testimony. I would like to follow up on that.

16:40:32 10 A. Yes, sir.

11 Q. So now, you reviewed the transcript of her testimony; is
12 that correct?

13 A. No, sir, I was here to see her testimony.

14 Q. All right. But you're not here contending that
15 Barbara Frederiksen-Cross testified on what Cox should do with
16 respect to terminating infringers, correct?

17 A. That's hard to say. It's not entirely clear what her
18 intent was with the testimony I put on the slide.

19 Q. Do you recall that the testimony on the slide really was
16:41:15 20 getting at the issue of who programs CATS; is that fair?

21 A. I think that's true. And if that was all of the
22 implication that was to be taken from that testimony, then I
23 think that's perfectly fine.

24 Q. All right. Now, you talked about some of what you -- you
25 talked about some legal uses of BitTorrent in your direct

1 testimony.

2 Do you recall that?

3 A. Yes, sir.

4 Q. You didn't at the time of your analysis do any kind of
5 quantification on how common those uses are, did you?

6 A. No, I didn't.

7 Q. Your testimony -- your purpose for talking about them
8 today was just to show that there are some legal uses; is that
9 fair?

16:42:07 10 A. Absolutely. There are some legal uses and, in fact, some
11 very important legal uses.

12 Q. But in terms of the prevalence of the illegal activity, at
13 the time of your analysis in this matter you had no reason to
14 dispute the studies showing that BitTorrent activity was well
15 over 90 percent infringing, correct?

16 A. I'm not sure what studies you're referring to.

17 Q. We'll get to that in more detail in a bit. And you also
18 discussed content owners potentially using BitTorrent.

19 Do you recall that?

16:42:47 20 A. Yes, sir.

21 Q. Nothing in your analysis in this case has led you to
22 believe that any of the plaintiffs in this matter have used
23 BitTorrent for distributing their music, correct?

24 A. I am not aware of any instances where the plaintiffs here
25 have used it for legal purposes.

1 Q. Now, we're going to get into your understanding of CAS and
2 how it compares to what Cox did in a moment in more detail, but
3 at a high level, I would just like to make sure I'm
4 understanding this correctly.

5 You referred to it as what you call an industry
6 standard, CAS, correct?

7 A. Yes, sir.

8 Q. And you had never heard of CAS before your work on this
9 matter, right?

16:43:36 10 A. That's correct.

11 Q. And your understanding of CAS comes from reading some
12 documents about it, right?

13 A. That's true in part. Also from testimony that I've seen.

14 Q. You didn't speak with the stakeholders in CAS, right?

15 A. No.

16 Q. And you didn't speak with other ISPs, right?

17 A. No, I didn't need to.

18 Q. Right. So your basis for calling it an industry standard
19 doesn't involve you going out and interviewing other ISPs that
16:44:04 20 didn't participate in CAS about how they handle infringement
21 issues, right?

22 A. That's correct.

23 Q. You have no idea what they do, correct?

24 A. That's correct, I didn't look.

25 Q. And in terms of calling CAS an industry standard, you have

1 no idea what the ISPs who participated in CAS did outside of
2 CAS, correct?

3 A. I think that's correct. The only caveat would be to the
4 extent their activities were summarized in the Stroz Friedberg
5 reports.

6 Q. You have no understanding of the extent to which the ISPs
7 who participated in CAS terminated subscribers outside of CAS,
8 correct?

9 A. That's correct.

16:44:49 10 Q. And likewise, in your comparison -- first of all, your
11 conclusion is that Cox's policy is more stringent than CAS,
12 correct?

13 A. I think that's correct. If you look at them as a whole,
14 that's correct.

15 Q. Now, in order to understand a policy, you need to know a
16 little bit about how it was implemented too, don't you think?

17 A. I don't think so.

18 Q. Well, I mean, would you agree that a piece of paper is not
19 worth anything if it's not followed, correct?

16:45:25 20 A. That's hard to say. I get the implication. It certainly
21 might be true. I think generally it stands to reason.

22 Q. But I'm correct, you have almost no understanding of what
23 Cox did with respect to implementing CAS, correct, implementing
24 its own policy, correct?

25 A. That's true. And by implication, that means I have some

1 understanding.

2 Q. Okay. We'll get -- you don't know why Cox structured its
3 graduated response the way it did, do you?

4 A. No. You would have to talk to Mr. Carothers.

5 Q. And you don't know at the time of your expert analysis in
6 this case whether Cox considered retaining subscribers as a
7 factor in formulating its graduated response, do you?

8 A. That's correct. That would be a question for
9 Mr. Carothers.

16:46:13 10 Q. All right. So you don't know why Cox over the years made
11 its policy more and more lenient, do you?

12 MS. LEIDEN: Objection, misstates the evidence.

13 THE COURT: Yeah. Lay a foundation.

14 BY MR. ZEBRAK: (Continuing)

15 Q. Do you have an understanding, sir, about whether Cox has
16 increased the number of steps in its policy over the years?

17 A. I would have to double-check. That's not my recollection.
18 It's not my recollection.

19 Q. Do you know what -- and you didn't know whether Cox had a
16:46:51 20 practice of imposing daily caps on how many notices it would
21 receive per rights owner, do you?

22 A. I -- I think I do. I mean, there's been testimony this
23 week, including by Dr. Weber.

24 Q. Well, let me -- let me be more precise with my question.

25 At the time you did your analysis in this matter, you

1 were unaware that Cox imposed caps on the number of notices a
2 rights owner could submit per day, correct?

3 A. I think when you took my deposition, that was my answer.

4 Q. And at the time I took your deposition, you were also
5 unaware of Cox's policy of blacklisting certain notice senders
6 such that Cox wouldn't even receive their notices, correct?

7 A. It's hard to remember what I remembered at the deposition.
8 I defer to whatever my deposition said.

9 Q. Fair enough. And at the time you did your analysis in
10 this matter, you didn't know what factors, if any, Cox
11 considered when it decided whether to terminate a repeat
12 infringer, correct?

13 A. That's correct. That's another question for
14 Mr. Carothers.

15 Q. In terms of Cox's practices in implementing its graduated
16 response policy, at the time you did your analysis you were
17 unaware, sir, were you not, that Cox was rolling up multiple
18 notices that come in on a given day into a single ticket for a
19 subscriber?

16:48:51 20 A. I don't recall if that was my understanding at the depo.
21 Certainly we've heard testimony to that effect I believe during
22 this trial.

23 Q. And at the time you did your analysts in this matter, you
24 were unaware, were you not, whether Cox had a daily cap on how
25 many accounts it would suspend a day regardless of how many

1 warranted that suspension, correct?

2 A. Again, if that's what I said in my depo, then that's what
3 I remembered when you took the depo.

4 Q. And you were aware at the time you did your analysis in
5 this case, were you not, sir, that -- that you didn't have an
6 understanding as to Cox's practice for when it actually would
7 terminate a subscriber, for actually reactivating it
8 immediately thereafter?

9 A. I'm sorry. Could you repeat the question?

16:49:39 10 Q. That was a terrible question. Let me say that more
11 cleanly.

12 Are you aware of Cox's practice of reactivating
13 subscribers in the rare instances where it terminated the
14 subscriber?

15 A. As I sit here now, I don't remember if there was testimony
16 here, but I believe there was testimony at some point that
17 customers could be reactivated after termination. For some
18 reason, the number of six months stands out in my head, but
19 that wasn't something I recalled.

16:50:16 20 Q. And I believe you said on direct testimony that you didn't
21 know anything about the negotiations that led to CAS, correct?

22 A. That's correct, at the time of my depo. I think we heard
23 some of that earlier from Mr. Marks.

24 Q. And I think we already covered this, but I just want to be
25 very clear.

1 Ahead of your work in this case and looking at the
2 CAS documents, you had never done any research on how ISPs
3 respond to copyright infringement allegations, correct?

4 A. That's correct, not something that specific.

5 Q. And that by the same token, you had never provided
6 services to ISPs on responding to infringement notices,
7 correct?

8 A. That's correct, not that specific.

9 Q. And am I correct, sir, that at the time of your deposition
10 in this case, you didn't even know whether CAS was still in
11 effect?

12 A. I believe that was accurate at the time of my deposition.
13 I think it's -- my understanding now is that it has ended.

14 Q. Sir, you've written an article on peer-to-peer file
15 sharing before, correct?

16 A. Close. I'm not sure I would call it peer-to-peer file
17 sharing. More sort of content exchange. But you're in the
18 ballpark, so I'll say yes.

19 Q. I'm sorry. Would you look behind what's in Tab 9 of the
16:52:37 20 binder that you have in front of you.

21 A. Yes, sir.

22 Q. Do you recognize what that is?

23 A. Yes, sir.

24 Q. And what is it?

25 A. It's the paper that I had mentioned in my direct

1 examination. It's a paper on a system called Pixie that I
2 coauthored with one of my students.

3 MR. ZEBRAK: Okay. Your Honor, we would like to move
4 this into evidence.

5 THE COURT: Any objection?

6 MS. LEIDEN: No objection.

7 THE COURT: Received.

8 MR. ZEBRAK: Would you publish the document,
9 Mr. Duval.

16:53:11 10 THE COURT: What's the number of it?

11 MR. ZEBRAK: 586, PX 586.

12 Thank you, Mr. Gould.

13 BY MR. ZEBRAK: (Continuing)

14 Q. So the idea here was to come up with the technology to
15 improve locating and distributing content in P2P networks, at a
16 high level; is that correct?

17 A. I don't think that's accurate.

18 Q. Well, if you look at the top of -- why don't you look at
19 the top of the first page. Do you see where it says: In this
16:54:04 20 work?

21 A. Yes.

22 Q. Mr. Duval, on the right side of the first page.

23 A. I think you mean in the Abstract, right, sir?

24 Q. No, on the right side, under your name where it says --
25 there we go.

1 A. I see. I'm sorry. That's in this paper, on the left side
2 it said: In this work.

3 Q. You were coming up with a new data location service to
4 layer onto existing P2P networks; is that correct?

5 A. Not quite. Probably the best description is under that
6 Abstract there, I can read that if you like.

7 Q. Can you move over to the Abstract?

8 Why don't you tell us what this paper was about just
9 at a very high level.

16:55:14 10 A. Sure. Essentially what it was trying to do is create this
11 distribution architecture and service, like a jukebox.

12 So the idea is, you go into a restaurant, like a
13 jukebox, you put in a quarter, you select a song, and then
14 everybody in the restaurant can hear what that song is. That's
15 kind of the jukebox model.

16 And we wanted to reduce the load on the network by
17 creating this kind of distribution mechanism like a jukebox.

18 Take, for example, a Web site like CNN. Lots of
19 people look at CNN. And so, if you distribute CNN across the
16:55:53 20 Internet using sort of a peer-to-peer distribution model, then
21 it doesn't put the burden of distributing that main Web page of
22 CNN on the CNN servers. It can be spread across a peer-to-peer
23 network, in effect, to accomplish one to many distributions.

24 So it's what I described in my direct testimony where
25 you're reducing the load and the distribution burden on the

1 content holders by allowing peers to participate in providing
2 the service that the content provider is intending.

3 Q. But nothing in this abstract is talking about paying for
4 music across a peer-to-peer network, correct?

5 A. That's correct. This really isn't about music, per se.

6 Q. Right. And could you turn to the inside of the second
7 page, on 2.1, and read the 2.1, the second paragraph.

8 Could you read those first two sentences to the jury.

9 A. Yes, sir: Napster's pioneering efforts spawned a number
10 of academic and industrial projects aimed at developing
11 efficient peer-to-peer content exchange applications. The
12 primary use of these applications has been the exchange of MP3
13 music files, but -- oh, sorry, that's the third sentence. I'll
14 stop.

15 Q. Right. And in this document you were coming up with a
16 more efficient system for distributing this content across a
17 peer-to-peer network, correct?

18 A. That's correct. To support the kinds of applications I
19 just described.

16:56:53 20 Q. I just want to make sure I understood your direct
21 testimony about Cox's use of Procera.

22 Am I correct that Cox was able to use and did use
23 Procera to gain insights as to the type of traffic occurring
24 across its network; is that correct?

25 A. Yes, with an emphasis on the type of traffic.

1 Q. So, for instance, it could generate and did in fact
2 generate reports telling it the percentage of traffic on its
3 network that, for instance, fell into the category of
4 peer-to-peer traffic, correct?

5 A. That's correct, at that level of detail.

6 Q. And I want to make sure that this is clear as well. I
7 believe -- am I correct, you testified that the Procera tool
8 that Cox had, including as Cox had it implemented in its
9 system, allowed Cox to look at the subscriber's traffic by
10 type; is that correct?

16:58:50

11 A. By type, that's correct.

12 Q. So just by way of example, Cox, in its abuse department,
13 if it wanted to look at a subscriber who was repeatedly
14 appearing in infringement notices, it could have used that tool
15 to see if that subscriber was still going back to BitTorrent,
16 correct?

17 A. It could have, that's correct. I haven't seen evidence
18 that they might actually have used it that way.

19 Q. Dr. Almeroth, if you could look back at the binder we gave
20 you at -- behind tab 7. Let me know once you are there,
21 please.

16:59:39

22 A. Yes, sir, I'm there.

23 Q. Do you recognize that document?

24 A. I can't say that I recognize it. Unfortunately, I looked
25 at lots of documents, so I don't --

1 Q. Would it help refresh your recollection if I gave you the
2 opportunity to look at the list of materials you considered
3 with your expert report?

4 A. You could do that, or you could represent that it's on
5 there.

6 Q. Well, I will represent that. And it's actually in your
7 report itself, too, if you want to look at paragraph 136, just
8 to refresh your recollection.

9 A. Thank you, sir.

17:00:37 10 Okay. I see that paragraph, and I see the reference
11 to the document that is at tab 7.

12 Q. So why don't you -- and this is a document you used and
13 relied on in your expert report, correct?

14 A. That's correct, for the purpose that I indicated in
15 paragraph 136.

16 MR. ZEBRAK: So, Your Honor, permission to publish
17 this?

18 THE COURT: Yes, sir.

19 MR. ZEBRAK: Thank you.

20 BY MR. ZEBRAK: (Continuing)

21 Q. So this is the document we were just talking about, right?

22 A. Yes, sir, that's correct.

23 Q. And you read this document in connection with your expert
24 analysis, right?

25 A. Yes, I did.

1 Q. Okay. Could you, Mr. Duval, turn to --

2 First of all, just by way of background, what's your
3 understanding of what Enders Analysis is?

4 A. I don't recall who they were sitting here, what their
5 qualifications were, what the providence of this document was,
6 other than, as you pointed me to, paragraph 136 of my report.

7 Q. What is -- under Executive Summary, what is the -- if you
8 want to take a look at that and see if that refreshes your
9 recollection about what this report involves.

17:02:38 10 A. I see the Executive Summary. It actually has subsections.
11 And so, spans four pages before you get to the Table of
12 Contents.

13 Q. Okay. Why don't you turn, sir, to the page labeled 10279
14 in the lower right corner. It says: Piracy and Antipiracy
15 Overview.

16 A. Yes.

17 Q. Mr. Duval, if you could highlight the first two sentences.
18 Could you read those aloud to the jury, sir.

19 A. Digital piracy is the free option for consumers of all
17:03:21 20 digital cultural products, whether music, video, or books. The
21 only requirement is a broadband connection. Piracy of CDs and
22 hard disk sharing are also well established practices.

23 Q. Right. And so, someone who is using their Internet
24 service to infringe, once that Internet service is suspended or
25 terminated, they can't use that service for infringement any

1 more; is that correct?

2 A. Not that service, that's correct.

3 Q. I would like to show you a document that has already been
4 admitted into evidence as PX 325.

5 A. Do you have a tab?

6 Q. I apologize, we don't.

7 A. Okay.

8 THE COURT: It's up on the screen.

9 Q. It's up on the screen in front of you.

17:04:17 10 A. Thank you.

11 Q. Do you know who Jason Zabek is?

12 A. I have heard the name. I see his title here and his
13 signature on the page you're about to scroll past, that's
14 probably the extent of what I understand about Mr. Zabek's
15 position at Cox.

16 Q. Can you see what it says under: Hello, gentlemen?

17 A. Yes, sir, I can.

18 Q. Now, in this e-mail Mr. Zabek is saying that Cox has a
19 more liberal strike policy than CAS.

17:05:11 20 Do you have any reason to think that that's not the
21 case?

22 MS. LEIDEN: Objection, only that it's not what the
23 e-mail states.

24 THE COURT: Well, he can read it.

25 So the question is, can you answer that question or

1 not?

2 THE WITNESS: I'm not really sure of the context of
3 this e-mail. Right. I see that it says the number 6. I mean,
4 I know that CAS has potentially six steps, but there is no noun
5 for the word -- for the pronoun "they." So I'm not sure
6 exactly what he's referring to.

7 BY MR. ZEBRAK: (Continuing)

8 Q. You didn't speak with Mr. Zabek in connection with your
9 work in this matter, correct?

17:05:57 10 A. No, I did not.

11 Q. And at the time you did your analysis in this matter, am I
12 correct that you weren't aware of any other scenario in which a
13 customer of a service is given 13 or more chances to stop using
14 that service to violate the law, correct?

15 A. That's correct, largely because I haven't looked or tried
16 to find any.

17 MR. ZEBRAK: No further questions, Your Honor.

18 THE COURT: All right. Any redirect?

19 MS. LEIDEN: Yes, Your Honor.

17:06:39 20 REDIRECT EXAMINATION

21 BY MS. LEIDEN:

22 Q. Are we good?

23 A. Yes, ma'am.

24 Q. Thank you. Dr. Almeroth, do you recall both on direct and
25 cross that you discussed net neutrality?

1 A. Yes, ma'am.

2 Q. And, James, could you pull up again page 17 of
3 Dr. Almeroth's slides, please. Thank you.

4 Dr. Almeroth, what should be coming up is on that
5 17th page -- you should have it there, too -- that was part of
6 your opinion that you were discussing on direct examination
7 with respect to net neutrality.

8 Do you recall that?

9 A. Yes, ma'am.

17:07:39 10 Q. Okay. And did you base that third opinion on any evidence
11 that you put on that slide there?

12 A. Yes. I based it on testimony from Ms. Trickey. I believe
13 she referred to net neutrality. And I believe I also based it
14 on conversations with Mr. Summers.

15 And I don't recall if Mr. Carothers also talked about
16 net neutrality. But certainly it has come up over the course
17 of the trial. And that's some -- that's similar to the
18 evidence that I've relied on.

19 Q. And this sentence on the slide, was there a particular
17:08:22 20 time period that you were looking at in stating that -- Cox's
21 understanding there?

22 A. Yes. It was during the claims period, so from early 2013
23 to late 2014.

24 Q. And I believe that Mr. Zebrak mentioned or stated that --
25 made reference to a decision by the D.C. Circuit to not impose

1 a penalty on Comcast in 2011. Do you recall that?

2 A. Yes, I do.

3 Q. What was your understanding of -- or strike that.

4 Could you explain what you mean in your number 3
5 given that you were discussing the 2012 to 2014 time frame?

6 A. Yes. So that was only one of the events in the back and
7 forth between some of the ISPs and the FCC and the courts. I
8 believe that after that action, the FCC rewrote its rules with
9 respect to net neutrality.

17:09:20 10 The bottom line is that there was a lot going on
11 through this time frame with respect to net neutrality. ISPs
12 had been sued, and so were using the testimony, for example, of
13 someone like Ms. Trickey to understand sort of their perception
14 of net neutrality. And what they could and what they couldn't
15 do was part of the consideration as to what you could do with
16 traffic monitoring and tools like Procera.

17 Q. Thank you. If you could take that down. Thank you.

18 Dr. Almeroth, do you recall on cross-examination
19 Mr. Zebrak asked you if you had considered or knew a number of
17:10:02 20 factors relating to the Copyright Alert System?

21 A. Yes, ma'am.

22 Q. And would that -- that included the fact of whether you
23 spoke to or interviewed ISPs or content owners with respect to
24 the Copyright Alert System?

25 A. Yes, ma'am.

1 Q. Was that important to your analysis?

2 A. It was not.

3 Q. Why?

4 A. Because the MOU sets forth what the steps are and what the
5 policies are. It was the basis of that document and what had
6 been negotiated and agreed to that mattered. That was the
7 baseline against which I could compare Cox's graduated
8 response.

9 And so, how it came to be, or the negotiations, or
10 any of those kinds of factors weren't really relevant in my
11 analysis because I had the signed MOU, I knew the parties, and
12 I knew what the agreement set forth.

13 Q. And do you recall Mr. Zebrak also posing questions to you
14 about whether you knew what ISPs were doing outside of the
15 Copyright Alert System?

16 A. Yes.

17 Q. Okay. And was that something that you considered
18 important to your analysis?

19 A. Also not important. So, no.

17:11:13 20 Q. Why?

21 A. The same thing. That the baseline here is CAS. It was
22 the agreement, it was negotiated, it set forth the steps. If
23 ISPs wanted to do things above and beyond what CAS had
24 prescribed, that was up to their decision as what to do.

25 But trying to come up with something that I could use

1 as a baseline to compare against Cox's graduated response
2 system, the CAS MOU was a great baseline against which I could
3 do that comparison.

4 Q. And on cross-examination do you recall Mr. Zebrak asking
5 you questions about whether you knew if Cox had increased the
6 number of steps in its graduated response over time?

7 A. Yes, ma'am.

8 Q. And what period of time were you looking at the Cox
9 graduated response?

17:12:05 10 A. I was looking at the procedures of the graduated response
11 system during the claims period. So early 2013 to late 2014.

12 Q. And did you look at Cox's graduated response before the
13 claims period?

14 A. I did.

15 Q. And can you explain that.

16 A. Yes. So I looked at documents that talked about what CATS
17 looked like from the time that Mr. Carothers designed it and
18 programmed it. And I didn't see any differences to the way
19 that it was used during the claims period.

17:12:41 20 Q. And, James, could you bring up the document that Mr.
21 Zebrak had put on. I believe it was PX 325.

22 Dr. Almeroth, do you recall looking at this e-mail on
23 your cross-examination a few moments ago?

24 A. Yes, ma'am.

25 Q. Okay. And do you recall reading out loud a couple of the

1 sentences in that first paragraph under: Hello, gentlemen?

2 A. Yes, ma'am.

3 Q. Could you read the last two sentences of that paragraph.

4 A. Yes. It says: Luckily -- or, lucky, 80 percent of our
5 customers that share copyrighted material stop by the second
6 warning. At each step we educate them on the illegal activity
7 and our AUP, the Acceptable Use Policy.

8 Q. And is that statement consistent with the information that
9 you learned with respect to CATS?

17:13:37 10 A. Yes, ma'am. That it was educational and engaged customers
11 to educate them.

12 Q. And that first sentence there that you read with respect
13 to 80 percent of your customers, is that also consistent with
14 the materials that you reviewed in putting together your
15 opinions?

16 MR. ZEBRAK: Objection, Your Honor, no foundation.

17 THE COURT: Sustained. It's beyond his testimony.

18 MS. LEIDEN: No further questions.

19 THE WITNESS: Thank you.

17:14:05 20 MS. LEIDEN: Thank you.

21 THE COURT: All right. You're excused, Dr. Almeroth.
22 Thank you, sir. Have a good evening.

23 You are excused. Have a good evening. Thank you.

24 Mr. Ruelas wants to have the last word with all of
25 our witnesses.

1 THE WITNESS: He told me to stay put, Your Honor.
2 Thank you.

3 THE COURT: All right. You were wise to listen
4 carefully.

5 NOTE: The witness stood down.

6 MR. OPPENHEIM: Your Honor, may we approach?

7 THE COURT: Yes.

8 NOTE: A sidebar discussion is had between the Court
9 and counsel out of the hearing of the jury as follows:

17:14:58 10 AT SIDEBAR

11 THE COURT: Yes, sir.

12 MR. OPPENHEIM: Now that we've actually heard
13 Dr. Almeroth's testimony, I would like to renew our prior
14 motion.

15 So what's come through here is that he had absolutely
16 no knowledge of CAS over than reading the MOU. He didn't speak
17 to any of the participants in CAS. He didn't do any study or
18 investigation into CAS. He simply read a document, which is a
19 legal document, but he's not a lawyer and he said he wasn't a
17:15:27 20 lawyer.

21 He then tried to compare it to Cox's graduated
22 response. And he testified that he had no knowledge outside of
23 the few documents that he reviewed about major aspects of Cox's
24 graduated response. And so, his comparison is, therefore,
25 flawed.

1 He also testified that he had no knowledge of what
2 ISPs were doing outside of CAS or -- CAS, sorry, and outside of
3 Cox. So, whereby, he can't testify as to what an industry
4 standard is, he has no idea what the industry was doing.

5 All he did was read a couple of documents that were
6 in the record and given to him by counsel. And I would,
7 therefore, ask that his testimony on CATS and CAS be stricken
8 and the jury be instructed to disregard it. I think the
9 testimony was improper.

17:16:17 10 MS. LEIDEN: First of all, I think it's not correct
11 that he reviewed one document. There was a slide that he put
12 up that had at least seven documents, and as well as interviews
13 with Cox and hearing the trial testimony over the last couple
14 of weeks.

15 THE COURT: The only thing that I'm concerned about
16 is that he said it was the industry standard, and whether he
17 could -- was able to support that.

18 MS. LEIDEN: Yes. And I believe that what came out
19 in his testimony was that his understanding of what CAS was,
17:16:48 20 was an agreement between the content owners on one side and the
21 five largest ISPs on the other side. And that was what he
22 based his understanding of what an industry standard was.

23 And counsel is free to cross-examine him on, you
24 know, why he considered it an industry standard, and that
25 didn't come out on cross-examination.

1 THE COURT: I mean, he put up the slide just like the
2 prior witness with the members of the group that met and over a
3 two-year period worked on the elements of the CAS system. And
4 we've had prior testimony on whether it was an industry
5 standard or an attempt by the music industry to try and get the
6 ISPs to cooperate.

7 So all that's been subject of prior, far more
8 in-depth testimony.

9 MR. OPPENHEIM: For somebody to be given the ability
10 to testify as the expert and to say it's an industry standard,
11 when he doesn't know what the industry is doing, is improper.
12 He has no idea what the industry was doing, industry of ISPs.

13 To the extent that he was testifying as to what the
14 plaintiffs and the movie studios were willing to accept, his
15 testimony was contrary to the testimony of the witnesses there
16 who said that outside of CAS there was a termination obligation
17 either because you exceeded six steps or you weren't a
18 participant in CAS.

19 THE COURT: Did he say that?

17:18:21 20 MR. OPPENHEIM: There was unequivocal testimony to
21 that effect by Mr. Marks --

22 THE COURT: Oh, no, I thought you were talking about
23 Mr. Almeroth.

24 MR. OPPENHEIM: Oh, no, no, not Mr. Almeroth. He
25 didn't testify to that.

1 THE COURT: Right.

2 MR. OPPENHEIM: What he testified to was in fact that
3 there was no termination by these ISPs, which is contrary to
4 the evidence that was in the record.

5 And he just doesn't know, that's the reality. He
6 came up here, no offense intended, but as a puppet. And he
7 shouldn't be permitted to testify that something is an industry
8 standard when he has no idea what the industry is doing.

9 MR. ELKIN: Your Honor, Mr. Oppenheim is basically
10 delivering his summation of the case. Which, again, he's a
11 couple days away from that.

12 THE COURT: Well, I mean, his point is a valid point.
13 You've got an expert testifying up here now who is well
14 credentialed and is saying, this is the industry standard. And
15 does he have the foundation to make that statement? Because
16 that has some extra meaning, "industry standard."

17 MR. BUCHANAN: If I may, I believe there's testimony
18 that the five ISPs that constituted CAS compromised 70 percent
19 of the ISPs in the United States.

17:19:29 20 So if 70 percent of the market has that, that's
21 pretty much an industry standard.

22 MR. ELKIN: That did come in a couple times. That
23 came in unrebutted.

24 THE COURT: It was on the slide that you showed him
25 this afternoon about who was participating in it.

1 MR. OPPENHEIM: May we -- I'm sorry. There was
2 testimony from Mr. Marks, who did participate, who was a fact
3 witness, who also is a lawyer who could read the documents, who
4 testified it was not an industry standard.

5 So now we have an expert who comes up and says it is,
6 but he has no basis for that, no foundation.

7 And we've been, I get it, objecting all along, and
8 Your Honor has been reluctant to limit his testimony, but we
9 had to see how it came in.

17:20:17 10 We've now seen how it has come in, and it couldn't
11 have been more clear that he just has no basis to testify about
12 what ISPs were doing.

13 MR. ELKIN: Your Honor, if he would have objected to
14 that question when it was elicited and that motion was granted,
15 you would have granted it, we would have -- there could have
16 been other testimony that could have been elicited at that
17 time.

18 The whole purpose of his testimony was to try to
19 convey some information with regard to how Cox had organized
17:20:47 20 its graduated response in connection with what was appropriate
21 in the circumstances. Looking at CAS as a benchmark was well
22 within the ambit of what he put in his report and what he
23 testified to at his deposition.

24 THE COURT: Okay. All right, I'm going to give them
25 a limiting instruction on his testimony. And I'm going to say

1 that they heard what information he used to do make that
2 determination, and they'll be the determiner of what weight to
3 give the CAS system. And that his calling it the industry
4 standard was based on a limited understanding of what the
5 industry was involved in.

6 And your exception is noted.

7 MR. ELKIN: All right.

8 THE COURT: Where are we --

9 MR. OPPENHEIM: I was just going to go to that.

17:21:37 10 THE COURT: Yeah. So where are --

11 MR. ELKIN: So we have two witnesses left. I think
12 there are issues with both because I think that they don't want
13 to go forward with Tregillis. I think Your Honor indicated
14 that Tregillis has to go on tomorrow, which is fine.

15 THE COURT: Yeah.

16 MR. ELKIN: And I don't think they're ready for
17 Mencher either. So I think those are our last two witnesses.

18 THE COURT: What's wrong with Mencher? How long is
19 he going to take?

17:22:02 20 MR. ELKIN: I would say he's probably a 45-minute
21 examination.

22 THE COURT: Is that by deposition or live?

23 MR. ELKIN: He's here. But, unfortunately, when we
24 learned that he wasn't -- they weren't ready for him, we didn't
25 call him to come across the street.

1 MR. OPPENHEIM: We're fine him going on on direct
2 today, that's fine. And if you want to push through, Your
3 Honor.

4 Or if you want to wait until tomorrow, that's fine
5 too. Either way.

6 MR. ELKIN: When they told us that they weren't ready
7 for him today, we didn't drag him over here.

8 THE COURT: Okay. All right. Then we're going to
9 break now. So we have two witnesses left.

17:22:39 10 MR. ELKIN: And then we'll move in some documents,
11 some exhibits.

12 THE COURT: All right. And you've got a rebuttal
13 case with at least --

14 MR. OPPENHEIM: At least one. And we'll figure out
15 tonight whether it's more than one.

16 MR. BUCHANAN: Could you identify the one?

17 MR. OPPENHEIM: Mr. McGarty -- or Dr. McGarty.

18 THE COURT: McGarty.

19 MR. BUCHANAN: And so, I want to be heard because the
17:22:59 20 judge limited to what he could testify about in your order.
21 You said he couldn't testify about certain things like
22 effectiveness.

23 THE COURT: We can let the jury go. So hold on. So
24 we may do closings tomorrow afternoon; is that right?

25 MR. ELKIN: Yes.

1 THE COURT: Yeah. Let's shoot for closings tomorrow
2 afternoon.

3 MR. ELKIN: Okay.

4 THE COURT: And we'll work to get the instructions
5 completed tonight. Okay?

6 MR. ELKIN: Thank you, Your Honor.

7 MS. LEIDEN: Thank you, Your Honor.

8 MR. OPPENHEIM: Yes.

9 THE COURT: Thank you.

17:23:29 10 NOTE: The sidebar discussion is concluded; whereupon
11 the case continues before the jury as follows:

12 BEFORE THE JURY

13 THE COURT: All right. So we have some logistics
14 issues with witnesses. So we're going to let you go a little
15 early tonight.

16 I wanted to let you know that Dr. Almeroth talked
17 about an industry standard, CAS being an industry standard.
18 And then you heard on cross-examination the foundation, he
19 really hadn't talked to a lot of people in the industry.

17:24:09 20 So I'm going to strike that testimony that it was an
21 industry standard.

22 Now, you've heard quite a bit about the CAS system
23 from other witnesses, and you may make your own conclusion as
24 to its importance and look at, for instance, the participants
25 that were involved in the negotiations, but just -- not just

1 based on Dr. Almeroth's statement. But independently using all
2 the evidence.

3 So we're going to end for today. We're going to come
4 back at 9 o'clock. We're going to have -- I think Cox has two
5 witnesses. The plaintiffs will have a rebuttal witness, or
6 maybe two, I'm not sure. But we should get to closing
7 arguments tomorrow afternoon. And we'll work to make that
8 happen.

9 So, please, no research, no investigation, no talking
10 about the case with anyone. And enjoy the evening, and we'll
11 see you tomorrow at 9 o'clock. All right.

12 NOTE: At this point the jury leaves the courtroom;
13 whereupon the case continues as follows:

14 JURY OUT

15 THE COURT: All right. Have a seat.

16 Mr. Buchanan.

17 MR. BUCHANAN: Yes, Your Honor. As you just heard,
18 the plaintiffs indicated they may call Dr. McGarty, who I have
19 great admiration for, and he is a good man, but --

17:26:09 20 THE COURT: But --

21 MR. BUCHANAN: But this just goes to your order, not
22 to any qualifications he may or may not have on subjects. You
23 ordered that Dr. McGarty could testify about functional and
24 technical abilities and general network architecture.

25 So I think at this point in the case, that's -- I

1 don't know if he is going to testify about that, it's somewhat
2 cumulative.

3 You said: Testimony will not be allowed regarding
4 reasonableness or effectiveness of Cox's procedures or why Cox
5 made certain decisions.

6 And that was because he was -- part of his -- one of
7 his rebuttal reports, reply reports went to Dr. Weber's use of
8 the term "effective." So that's not in the case.

9 You said: Plaintiff will not be allowed to offer
10 expert testimony related to Cox's procedures to the extent it
11 is cumulative at trial. And that goes to, you know, hold for
12 -- hold the first one, and the six steps, and then all that.

13 So that's totally cumulative at this point. It's
14 already in. And his testimony is, he's not opining on what Cox
15 should have done or what they didn't do, he's just -- his
16 testimony and his report were just that here are the steps,
17 here is what they did, here's what are the policies and
18 procedures.

19 So I just would like to get some clarification as to
17:26:53 20 what they intend to offer him on at this point.

21 THE COURT: All right.

22 MR. OPPENHEIM: With the caveat that we're still
23 working on what he's going to say, we have to yet hear from Mr.
24 Tregillis, but we're calling him as a rebuttal witness to --
25 only to respond to the testimony that's been proffered so far

1 in the case. You know, he has the ability to attest to what
2 Cox was capable of doing and will, I'm sure, speak to that.

3 We don't intend to ask him what Cox's policy should
4 have been. That's not for him or, frankly, anyone to testify
5 to. The jury can decide that, Your Honor.

6 But we'll also ask him to respond to other statements
7 that have been made by other experts during the course of this
8 proceeding about, you know, network architecture issues and the
9 like.

17:28:37 10 But it will all be rebuttal, Your Honor, to existing
11 testimony.

12 THE COURT: I am not going to limit -- I mean,
13 Dr. Almeroth talked quite a bit about the network, and also the
14 CAS versus the Cox systems, of the graduated response.

15 And so, as long as we're not prolonging a rehash of
16 the direct evidence that you had, but are focused on areas that
17 you believe are probative, I'm not going to bar you from doing
18 that.

19 I just didn't want you to get up and get Dr. McGarty
17:29:29 20 up and remind the jury of everything that they heard over the
21 last two weeks. Which, believe me, I have had people attempt
22 to do that. So -- and I understand why that might be the idea.

23 So as long as you're mindful of the testimony by the
24 Cox witnesses about these issues, you're not going to have a
25 problem.

1 MR. OPPENHEIM: Thank you, Your Honor.

2 THE COURT: Okay. All right.

3 MR. BUCHANAN: Your Honor, just one point on that. I
4 understand he may be rebutting whomever, but I assume he's
5 confined to what he said in his expert report.

6 In other words, he gave an opening report, and then
7 Dr. Weber, for example, gave a report, and he responded at
8 length, an entire report about effectiveness and control group.
9 So that was out. So I assume we're not going to hear about
10 that because he -- you know, the Court ruled she couldn't
11 testify about effectiveness.

12 THE COURT: I think that's a jury issue. And I want
13 to preserve that for the jury.

14 MR. BUCHANAN: Okay. And I don't want that to be the
15 subject of either side's experts. And I think we all
16 understand that.

17 Okay. So no problem with that, Mr. Oppenheim?

18 MR. OPPENHEIM: No problem with that, Your Honor.

19 THE COURT: Okay. Are you going to get some sleep
20 tonight then? Is that what this is all about?

21 MR. OPPENHEIM: But no problem with the second issue
22 that he described. The first --

23 MR. BUCHANAN: The sleep part?

24 MR. OPPENHEIM: The first, Your Honor, is that we
25 expect Dr. McGarty to respond to the testimony that came in

1 today.

2 THE COURT: Within the confines of his reports, and
3 not going -- or deposition, and not going -- oh, all right. I
4 see what you're saying.

5 MR. OPPENHEIM: He's a rebuttal witness.

6 THE COURT: Rebuttal witness, yeah.

7 MR. BUCHANAN: But his report -- so, I mean, it's
8 not -- this is not in a vacuum. Again, Dr. Almeroth filed a
9 report, and he rebutted it in limited part. Okay. He had
10 certain information, for instance. And then he rebutted on
11 Procera. And so, we have that.

12 So, in other words, he had the opportunity to rebut.
13 So Dr. Almeroth was limited to his expert report. And what I'm
14 saying is, Dr. McGarty should be limited to his rebuttal report
15 in response to that.

16 THE COURT: It certainly ought to be relevant to
17 Cox's case, but exactly, you know, in the -- within the four
18 corners, I don't automatically think that that is the -- a
19 rebuttal expert's limitations. I think they can -- there may
20 be some areas -- you know, let's just take it --

21 MR. BUCHANAN: One step at a time.

22 THE COURT: -- question by question.

23 MR. BUCHANAN: That's fine. Thank you, Your Honor.

24 THE COURT: All right, thank you.

25 All right. Let's take a short recess and come back

1 and do jury instructions if we don't have other issues. Okay.

2 Let's take ten minutes and we'll -- have you all --
3 you know, I heard some promises out there last week, oh, we're
4 going to look at this, and we're going to look at that, and
5 maybe we will look at taking the word "intentional" out.

6 So if you have reached -- or if you have redrafted
7 any instructions based on -- I don't know, whatever we met last
8 week --

9 MR. OPPENHEIM: So we did have a conference call last
10 night. And I think we maybe narrowed some of the issues, Your
11 Honor. Not surprisingly, we haven't resolved them all. But I
12 think where we could reach some agreement, we have. And
13 hopefully can define the issues that remain for you succinctly.

14 MR. ELKIN: I think he's correct.

15 THE COURT: Thank you. I look forward to that. I
16 appreciate you trying.

17 All right. We're going to take ten minutes.

18 We're in recess.

19 NOTE: At this point a recess is taken; at the
20 conclusion of which the case continues in the absence of the
21 jury as follow:

22 JURY OUT

23 THE COURT: All right. Do you all have a plan on how
24 to do this? We used plaintiffs' jury instructions last time.
25 They don't include several of the defendants' proposed

1 instructions. But how do you want to proceed?

2 MR. ELKIN: Well, Your Honor, I guess -- let me just
3 report on what we tried to do, just to set the stage,
4 Mr. Oppenheim alluded to it.

5 As he recounted, we did have a conference call last
6 night. We reviewed issues that were outstanding with regard to
7 both the jury instructions and the verdict sheet. I think we
8 narrowed the gaps on the verdict sheet. And we provided a
9 redline to counsel. So that's one issue.

17:51:31 10 I think there are a handful of issues that do remain
11 with the jury instructions sort of keying off the hearing that
12 we had with Your Honor last Thursday night. I think there is
13 probably more disagreement, you know, with regard to that, but
14 there are no big surprises, I don't think.

15 But whatever the Court's pleasure is in terms of
16 using the documents is fine. We can proceed any way that the
17 Court would like.

18 THE COURT: Well, then why don't we start out by
19 talking about the works and your 504 issue. And -- you know,
17:52:15 20 we have had a chance to look at some of the cases on, you know,
21 whether the Second Circuit EMI case, or there is kind of an
22 interesting Seventh Circuit case that came out in August where
23 they do a little, you know, tour of the circuits and reference
24 back to Fourth Circuit cases.

25 I mean, the Fourth Circuit cases, whether it's Judge

1 Davis or Judge Gregory -- Judge Gregory's is pretty dated and
2 pretty minimal.

3 But why don't we start there? What do you propose
4 that we do with the instruction on how many works count for
5 purposes of infringement?

6 MR. ELKIN: Sure. So there are two issues, as Your
7 Honor knows. One is on the copyright registrations, all of the
8 songs that were registered as a compilation. And then the
9 other issue is where the registrations in the case have a music
10 composition, a PA, that correlates to the same song that's a
11 sound recording.

12 And just so that we're on the same page, and this is
13 our most up-to-date recounting, and we could sort of -- what I
14 intended to do was sort of brief this and hand up -- I was
15 going to present this really at the close of our case tomorrow,
16 which I'm hoping will occur before lunch.

17 One of the things that we talked about, at least on
18 our side, is to actually call Mr. Mencher first. I think
19 that's probably a 25- or 30-minute direct. And then have
17:54:22 20 Mr. Tregillis, who is probably no more than 30 or 40 minutes,
21 and whatever cross there is. And we could move some documents
22 in, and we would probably file a motion, a Rule 50 motion at
23 that time and include this.

24 But what you'll find of the -- all of the works in
25 suit, the way we've done our math, is that you would end up

1 with, if the Court were to agree with the application, as we
2 have argued, you would end up with 1,453 sound recordings and
3 870 music compositions, or PAs, for a total of 2,323.

4 We, obviously, have to present that in a way for, for
5 both the other side to understand and for Your Honor to be
6 faced with.

7 But to the extent that Your Honor is going to decline
8 ruling on the Rule 50 motion, then, you know, we have -- I
9 think we did lay out the instructions in our initial jury
10 instructions to sort of deal with both of those issues.

11 And we would take the jury through -- we will move in
12 the certificates tomorrow before we close, and basically do --
13 I'll do my level best to try to describe it. It's not the
14 easiest thing, as I mentioned last week, but I will muddle my
15 way through it.

16 That's what I would propose.

17 THE COURT: Okay. I mean, there is just a lot of
18 moving and shaking as to whether the jury should do that or --
19 you know, which is why I -- you know, looking at that when I
20 did, I just essentially deferred on it until we really had
21 focused on it. And so, that's why we're here now talking about
22 this.

23 MR. ELKIN: So my experience in the past, and I have
24 actually been in their shoes, I have been on the plaintiff's
25 side and the defendant's side on these matters, and I just -- I

1 think these are straight legal issues. We're not really
2 quibbling. It's either -- you've got the certificates and you
3 have got the law, and it's -- from our point of view, we think
4 that whatever your -- you know, whatever the answer is, the
5 Court can rule on that.

6 THE COURT: Should I be looking at independent
7 economic value as to whether I should consider albums and
8 compilations versus individual songs, or is that a jury issue?

9 MR. ELKIN: Well, I think the economic -- independent
10 economic value is something that the courts look to, as Your
11 Honor has observed, I am sure, from reading the jurisprudence,
12 in situations where there is an issue about whether something
13 is a compilation, whether or not it has -- like in BMG, the
14 music, we know these were individual musical compositions,
15 there were no correlative sound recordings.

16 But here you have by force of nature, and why this is
17 sort of an easier issue in some respects to take up from a
18 legal perspective, because you have certificates of
19 registration that have identified the sound recordings in the
20 case of the sound recordings argument that were registered as a
21 compilation.

22 And there is no surprise to that because we know that
23 the music industry has the -- for many years now has -- with
24 some exceptions -- there are clearly sound recordings that have
25 their own SR in the case, and that will be excluded both from

1 our motion and from the -- what we're asking for here, from the
2 numbers that I just recounted. The only time that an
3 individual SR would be implicated in the 504(c)(1) context is
4 where there is a PA for the same song.

5 So I think the independent economic fact finding is
6 something that becomes relevant where there is an issue about
7 whether something, you know, was at some point published
8 separately. And whether it was exploited separately and
9 whether or not it can be viewed and deemed to be, you know,
10 part of some sort of a collective work.

11 But I don't think there is any serious issue when you
12 have a limitation, as we are proposing in terms of the argument
13 that I'm attempting to frame up, where all of the constituent
14 sound recordings are registered as a compilation.

15 THE COURT: Okay. Thank you.

16 MR. ELKIN: Okay. Thank you. You're welcome.

17 MR. OPPENHEIM: Your Honor, I'm somewhat at a loss as
18 to how this could be done on a Rule 50 motion.

19 The idea that the day before the trial ends we're
20 being told that there should be a Rule 50 motion to reduce the
21 number of works in the suit from 10,000 to 2,300 without any
22 evidence that has been put forward in the case about how they
23 arrived at that number, to me doesn't make any sense.

24 And if he's going to orally get up here and try to
25 give you some summary and analysis and expect that the

1 plaintiffs are going to be able to respond in this context,
2 that's not the purpose of a Rule 50 motion. It's not how I've
3 ever seen it used in a copyright case, and don't think it's the
4 proper vehicle here.

5 There's been testimony, which has not been challenged
6 by Cox, from the record company and the music publisher
7 witnesses, all of whom testified that these works have their
8 own independent lives, they're marketed and sold
9 independently -- individually. They're also sold as albums.

18:01:08 10 The fact that they may be copied -- the copyright
11 registration may be a compilation, is not a function of whether
12 or not they should get individualized protection.

13 And so, the idea that we're going to present this in
14 a Rule 50 to me doesn't work, it doesn't make sense.

15 THE COURT: It all is going to fall, you know, from
16 the framework of the jury instructions, which are an
17 independent consideration, whether we have a Rule 50 motion or
18 we have -- the jury needs to be told how to calculate damages.
19 And the case law is, frankly, all over the place as to
18:01:50 20 whether -- if you have compilations, whether individual works
21 within that compilation get their own separate damages
22 consideration, or you look at the compilation. Right?

23 MR. OPPENHEIM: So, Your Honor, I'm not sure on the
24 compilation issue that the case law is kind of all over the
25 place. I believe that on that issue that the case law has all

1 been leaning towards allowing individual works to be subject to
2 a separate damage award.

3 And we can, we can address that as a matter of law,
4 Your Honor. But the way -- I mean, Cox chose to present it to
5 you in a way -- in a summary judgment brief that I think wasn't
6 the proper way to put it forward to the Court, and the Court
7 appropriately denied it.

8 The idea now that it's a Rule 50 motion -- it's not a
9 directed verdict. It's a -- the question that they're asking
10 is whether or not you should be able to get a damage award with
11 respect to certain works in the suit. That's the question.
12 That's not a directed verdict question. So I don't think it's
13 a Rule 50 issue.

14 Now, the question of whether it goes to a jury is a
15 separate question. So -- and on that issue, I think the jury
16 would see the instruction, have absolutely no idea what to do
17 with it because there's been no testimony on it.

18 So I would be inclined to say there should be no
19 instruction on it because there's no reason to confuse the jury
20 on the last day of the trial on something like this.

21 To the extent that they believe that as a matter of
22 law -- let's assume the jury comes back with a -- there's no
23 instruction on it to the jury, there's no Rule 50 motion, and
24 the jury returns a verdict on 10,000 or so works. To the
25 extent that Cox believes as a matter of law that is improper

1 because certain works shouldn't have received an award, they
2 can file that as a post-trial motion and the Court can consider
3 that.

4 I think at this point, that's the only way to do --
5 to deal with this issue.

6 THE COURT: I think I read some cases that said that
7 the District Court shouldn't be looking at remittitur, and they
8 should have asked the right question at the right time of the
9 jury instead of trying to --

18:04:25 10 MR. OPPENHEIM: Having tried two copyright cases that
11 were remitted three times, that actually happened, I may be the
12 only guy in history who has done that. I'm not suggesting that
13 this Court do it through a remittitur. But there are other
14 mechanisms by which -- that they can file post-trial motions
15 and outside of a remittitur, I believe.

16 But I just, I don't -- rule -- and it's not incumbent
17 on me to tell them how to present their case and how to push it
18 forward. And so, I'm not doing that. But Rule 50, it's not a
19 directed verdict issue, it's just not.

18:04:58 20 And I think that if they had -- they had every
21 opportunity to present evidence and witnesses and even experts
22 had they wanted to on the issue, on these issues. They chose
23 not to. And they at the last minute, frankly, only by Your
24 Honor's grace, having allowed them to put in the SRs and PAs,
25 which otherwise they weren't even putting in evidence before.

1 So this is a problem of their making, and it's not
2 for me to solve it. But it's not Rule 50, and I don't think
3 confusing the jury at this point is the way to go on that.

4 THE COURT: Well, what's your answer to the bottom
5 line as to what we should instruct the jury on whether
6 compilations, if they include ten songs and they're registered
7 as a compilation versus individually -- and I can't remember
8 what the testimony was from the plaintiffs on how -- you just
9 explained a little bit about how they're marketed, and they're
10 individual, and they're considered individually --

11 MR. OPPENHEIM: With your permission, Mr. Zebrak
12 argued this on be summary judgment, I'll defer to him on these.

13 THE COURT: Certainly.

14 MR. ZEBRAK: On this -- so as Your Honor is aware,
15 there are two statutory damages issues that Cox's counsel is
16 raising. We're going to put aside for a moment the SR/PA
17 issue. Just on the compilation issue.

18 The case that they rely on, the MP3Tunes case from
19 the Second Circuit came after LimeWire, several other courts.
20 They've all recognized that in this digital era where works are
21 commercialized both on an album, but also individually, the
22 fact that they're on an album doesn't preclude them from
23 receiving separate statutory damages awards. And that's what I
24 believe happened in the MP3Tunes case and what LimeWire did
25 before that, and is exactly the testimony here. Which is that

1 all these works have been commercialized individually.

2 And so, I get the SR/PA issue is separate, but on
3 this issue, quite frankly, I don't believe they've cited any
4 case law at all saying that works commercialized in this time
5 period of the infringement don't get individual awards.

6 And what is a work is not determined by the
7 registration. What is a work is a separate issue. And I think
8 all the cases support us here.

9 THE COURT: So did you read the Sullivan versus Flora
10 case, the Seventh Circuit case from August?

11 MR. ZEBRAK: I, standing here right now, don't recall
12 one way or the other, but we'll be happy to look at it.

13 THE COURT: Well, I mean, it directs -- it goes
14 through the Ninth and 11th and D.C. Circuits, and follows the
15 First Circuit, and then they have the Second Circuit, and they
16 identify that -- you know, it's dated. And that: We conclude
17 in keeping with the First, Ninth, that that 504(c)(1) requires
18 Courts confronted with circumstances with multiple works and
19 multiple infringements, to determine or to charge a jury with
20 factfinding tailored to answering whether the protected works
21 have value only in and through their composite whole instead of
22 their standalone value at the level of one work.

23 And it has: Protected work has standalone value if
24 the evidence shows that the work has distinct and discernible
25 value to the copyright holder.

1 And if that were the instruction to the -- that I
2 gave, what's the evidence that they could use to consider that?
3 That would be the testimony of the plaintiffs' witnesses on the
4 value and they're looked at individually? Is that your
5 response to that?

6 MR. ZEBRAK: Yes, Your Honor. And I'm --
7 Mr. Oppenheim will speak more about the verdict form itself,
8 but I'm not sure the jury even needs that instruction because
9 that's the only evidence in the case in terms of them being
10 commercialized individually.

18:09:12

11 Their experts looked at royalty information. I mean,
12 there's no dispute that these things have all been
13 commercialized individually and have their own economic life.
14 And so, I know that SR/PA issue is separate, but I think on
15 this one just everything is in our favor.

16 THE COURT: Okay.

17 MR. ELKIN: So briefly, Your Honor, I don't think
18 that we've respectfully ambushed anybody. We moved on summary
19 judgement --

18:09:41

20 THE COURT: Yeah, and that's fine.

21 MR. ELKIN: As soon as we got Your Honor's
22 instruction -- Your Honor's motion for summary judgment, I was
23 in Dubai on a business trip, and we arranged for a conference
24 call with the other side, and we were trying to work out
25 stipulations. One of the stipulations that I was proposing was

1 the copyright registrations. That tipped them off and then
2 they withdrew it, because I was very much concerned about this.

3 We didn't have a chance to put on our case until, as
4 Your Honor remembers, towards the middle of late to last week,
5 the middle of last week, and we've been having this discussion
6 with other side since.

7 And no one is trying to ambush anybody. They know
8 about this issue. We've been very concerned about the issue
9 given the scale of the case and the exposure to my client.

18:10:31 10 The issue here, frankly, is I wasn't going to just
11 make a verbal motion for a Rule 50. There will be a written
12 motion which lays all of this out.

13 And -- but in terms of the instructions, which is
14 what Your Honor had asked, we had crafted instructions. The
15 other -- you know, the plaintiffs haven't done that. I'm happy
16 to, you know, have a discussion about the instructions that we
17 proffered, but I -- we thought they were appropriate.

18 And I don't -- I can't speak to Mr. Oppenheim's
19 experience. He's an experienced trial lawyer handling many
18:11:04 20 cases. I can tell you that any time that I've done this over
21 the years, it's always been through at this stage Rule 50
22 motions, or it's happened earlier on summary judgment.

23 So, obviously, we're prepared to go to the jury with
24 it, but we did submit instructions.

25 THE COURT: Okay.

1 MR. OPPENHEIM: May I --

2 MR. ELKIN: And the other thing I would say, Your
3 Honor, is I may be wrong because it's been a long trial, but my
4 recollection of the plaintiffs' testimony as to separate
5 economic value, there was probably two sentences from
6 Mr. Kooker, the first witness from Sony, and that was really
7 about it.

8 So the notion that somehow they put on a case to go
9 through 10,000 or so works and describing how they were used
10 and how they're unique, I just -- I think that's a bridge too
11 far.

12 MR. OPPENHEIM: So, Your Honor -- I'm sorry.

13 THE COURT: No. I was just going to say that I don't
14 want you to forget about the SR and PA, whatever it is.

15 MR. OPPENHEIM: Before we turn to that, if I may,
16 Your Honor. Two things on this.

17 One is, the witnesses did speak to the individual
18 recordings, absolutely. And while Mr. Elkin may say, you know,
19 that they've been thinking about this all along, they didn't
20 ask a single record or publishing industry witness a single
21 question about this. They didn't elicit anything on the issue
22 of compilation. They didn't put an SR or a PA in front of any
23 of those witnesses to ask them about it. There is no record
24 whatsoever on this yet, other than the record we've presented.
25 And that record, I believe, fully supports all 10,000 works

1 being in the case.

2 I also believe, Your Honor, that -- that there's an
3 issue here in terms of estoppel. Your Honor ruled on this
4 compilation issue I believe in BMG1, and it was not -- that was
5 not one of the issues that the defendants appealed.

6 THE COURT: But they were all sound recordings, and
7 we didn't have the -- I don't think there was even any
8 evidence -- there may have been evidence of compilations, but
9 no one --

18:13:31 10 MR. OPPENHEIM: They were all I think published
11 works, right?

12 THE COURT: Right.

13 MR. OPPENHEIM: But in any event, Your Honor, you
14 know, I just -- given that there's zero evidence before the
15 jury on this compilation issue, giving them an instruction on
16 it, to me, I think they can scratch their heads and say, what
17 are we supposed to do with this?

18 And we certainly don't want them to sit back there
19 with, you know, thousands and thousands of registrations
18:13:57 20 thinking that they've got to figure this out when nothing has
21 been presented to them on it.

22 On the second issue -- and again, I'll allow
23 Mr. Zebrak to speak to the pure legal issue. I do think that
24 there's -- I believe there's only one circuit that has spoken
25 to it, there's a Second Circuit decision, there's a Southern

1 District decision. The Second Circuit decision, I think,
2 doesn't interpret the clear language of the statute. I think
3 it's wrong. I think Judge Rakoff in New York had it right.

4 But putting that aside, again, there's nothing for
5 the jury here to get their arms around and understand and be
6 able to digest. And I think it's the exact same thing.

7 And similarly, it's not a Rule 50 issue. That
8 argument applies again on this. It goes to the question of how
9 many statutory -- for statutory damages purposes, how many
10 works the jury gets to consider. It's not a directed verdict
11 on those. You could still have those works independently
12 infringed. The only question is whether you get statutory
13 damages on them. That's not a directed verdict issue.

14 But I'll let Mr. Zebrak speak to the pure legal
15 issue.

16 THE COURT: Okay. Go ahead, Mr. Zebrak.

17 MR. ZEBRAK: I'll just hit the highlights. I know
18 you have briefs from summary judgment.

19 As Mr. Oppenheim mentioned, we're aware of one
20 circuit having reached this issue, the Second Circuit in the
21 MP3Tunes case. So oddly enough, that case that they brought
22 forward on that issue, they didn't bring forward on the
23 compilation issue. So it kind of cuts two ways for each side.

24 But we think the Second Circuit got it wrong. And
25 the Second Circuit, quite frankly, did not address the issue

1 that we're raising here. It would just be an absurd
2 interpretation or application of this statute --

3 THE COURT: When a song and the recording are
4 combined and presented to the audience as one, that it would be
5 absurd not to give two awards?

6 MR. ZEBRAK: Well, I'm happy to answer that, but I
7 would like to do it in the context of the statute, and that's
8 what I was referring to, not the -- I mean, I recognize these
9 are complex issues that we're all addressing.

18:16:22 10 What I'm addressing by absurd is the notion that the
11 statute could be interpreted in a way where the record company
12 and music publisher could pursue separate actions and each get
13 their own awards, but for judicial efficiency and lots of other
14 reasons are in one case, then they only get one award. That
15 could not be what Congress intended. There is no indication in
16 the legislative history that that's the scenario that Congress
17 had in mind.

18 You know, the statute speaks in terms of the
19 copyright owner, singular. And I know that words can be
18:17:00 20 pluralized, but, you know, there is a long-standing doctrine of
21 kind of reading all the language together so, you know, it
22 doesn't have sort of a crazy result.

23 And that is what, I submit, is exactly what would be
24 here. The context doesn't indicate that you can pluralize the
25 word because to do so would mean that we couldn't be here in

1 this case. There would be multiple cases around the country
2 instead of just this one.

3 And, you know, the Second Circuit did reach the
4 result that Mr. Elkin is advocating for, but it didn't address
5 the legislative history argument I'm raising now. Instead,
6 it -- excuse me -- I didn't say legislative -- I didn't mean
7 legislative history. It didn't address the statutory language
8 interpretation I'm raising now.

9 The Second Circuit merely cited to the Patry treatise
18:17:53 10 and the legislative history and didn't -- you know, didn't
11 address what we're raising now. And, you know, we're dealing
12 with the copyright statute. There are purposes to it in terms
13 of promoting creation and dissemination.

14 And, you know, the concepts behind the statute, as
15 well as just strict statutory interpretation, I just think
16 can't lead to this result. These are separate, separate works,
17 separate owners. You know, these are separate companies that
18 own these things.

19 You have a music publisher that is associated with a
20 songwriter that creates and owns a work, a composition. Then
21 you have a separate record company and its artists involved.
22 These have separate economic values. They're separate work,
23 separate owners.

24 And, you know, the only reason we're here is because,
25 you know, that one statutory provision talks about the

1 copyright owner, singular, and then talks about the compilation
2 and the language you're familiar with.

3 THE COURT: All right, thank you.

4 Mr. Elkin.

5 MR. ELKIN: Thank you, Your Honor. So this has been
6 the discussion, not only of jurisprudence, but the House
7 Judiciary Committee actually has held hearings and there have
8 been roundtables that have been convened by the U.S. Copyright
9 Office. I even testified seven or eight years ago when this
10 issue was being taken up.

11 It's -- a sound recording and music composition are
12 looked at under the law as something that derives out of each
13 other. The sound recording clearly derives out of the music
14 composition. I don't think there is any serious issue.

15 I think what they're struggling with is this notion
16 of having separate copyright owners in the same action, but
17 they made that decision. Which is fine, they made that
18 decision to join their claims in one case. That's their
19 prerogative.

18:20:04 20 And had they elected, which is still their election,
21 to go for compensatory damages, then they don't -- they're not
22 affected by this rule. The only issue is statutory damages in
23 one claim.

24 Mr. Oppenheim a few minutes ago, before he released
25 the lectern to Mr. Zebrak, made reference to this Judge Rakoff

1 decision that I think we had discussed before you on summary
2 judgment. And I actually represented the plaintiffs in that
3 case. And there were separate publishing companies from sound
4 recording companies. And I made that same argument, and Judge
5 Rakoff agreed with that.

6 The MP3Tunes case overruled that decision and
7 expressly took on that issue. I don't think it's a big stretch
8 to see how a sound recording derives out of the music
9 composition, and it's a pretty clear decision.

18:21:05 10 I know that Mr. Zebrak raised this plain text
11 argument on the Rule 56 motion. I am not going to repeat those
12 same arguments. I think Your Honor has it, but I think it's
13 clear that these -- that one derives out of the other, and I
14 think there is clear precedent for it.

15 THE COURT: So it fair game then for argument to be
16 made that for these combined works where you have both, that
17 the jury could consider the statutory damages framework in some
18 heightened capacity?

19 MR. ELKIN: I'm not sure that the factors that Your
18:21:46 20 Honor would consider identifying for the jury as something they
21 should consider would specifically go into those issues. I
22 suppose it could.

23 But I think, you know, as a matter of law, they
24 shouldn't be charged with having to decide whether any works
25 that are otherwise barred under Section 504(c)(1) is something

1 that they could find to be eligible for a separate statutory
2 damages award.

3 I'm not suggesting that they can't find that the
4 works are infringed. They're in the case, they're in the case,
5 works are works. But solely for -- if they get down to the
6 point in the verdict sheet where they're awarding statutory
7 damages and they're actually considering so many of the works
8 in issue that are compilations or otherwise subject to the --
9 you know, to the collective or compilation statutory language,
10 I think that's -- I think that runs afoul of the rule.

11 THE COURT: Yeah. I mean, if I give the plaintiffs'
12 statutory damages instruction, which, of course, we will talk
13 about in a minute, but it does talk about circumstances of the
14 infringement, the revenues lost.

15 Okay. Understood. Thank you.

16 MR. ELKIN: Thank you, Your Honor.

17 MR. OPPENHEIM: If I can just add one thing.

18 There is a huge distinction between what we have in
19 this case and what was in MP3Tunes in the Second Circuit
20 because in that case the plaintiff, the same plaintiff company
21 owned both the SR and the PA.

22 Here, Mr. Kokakis gave test -- who is from Universal
23 Music Publishing Group, he gave testimony that wasn't
24 challenged, that there were many instances in this case where
25 one of the record companies owned a recording and the

1 underlying composition to that recording was owned by an
2 entirely separate and different music publisher.

3 You know, so, for example, that Sony ATV, the music
4 publisher, may have owned the composition, but Universal owned
5 the sound recording.

6 And so, you end up with this very perverse situation
7 if you lump them all together, that if you give one award, how
8 much does Sony ATV get? How much does Universal get? How much
9 does the songwriter get out of that? How much does the
10 recording artist get out of that?

18:24:36

11 So in MP3Tunes --

12 THE COURT: But there isn't any evidence as to how
13 many times that occurred. It was just -- not anecdotal, but it
14 was, here's the reality of what's going on and, you know, at
15 least there are -- there is separation in ownership between the
16 song and the music. And so, the jury couldn't calculate that.

17 MR. OPPENHEIM: I agree. That was not -- Cox has not
18 presented any evidence of overlap, if you will, if that's what
19 you want to call -- for lack of a better term, overlap.

18:25:17

20 THE COURT: Right.

21 MR. OPPENHEIM: But it really -- it's critical
22 because the witnesses spoke to the fact that, you know, that
23 monies get paid out to the artists and to the engineers and to
24 the unions and everything else. And if you lump them together
25 across different companies, that's a situation that the Second

1 Circuit never considered.

2 And so, I think it is a very different fact pattern.

3 THE COURT: Thank you.

4 MR. ELKIN: Your Honor, I think Mr. Oppenheim
5 inadvertently misspoke. The MP3Tunes did involve separate --
6 it did involve separate plaintiffs. That's why it overruled
7 the TVTunes versus MP3.com. There were separate plaintiffs
8 that had the different rights.

9 Unless there are further questions, I think you have
10 it.
18:26:11

11 THE COURT: No.

12 MR. OPPENHEIM: Just -- they were all EMI Capital
13 entities. So they were different companies, but all owned
14 under the same umbrella. So I acknowledge, as a technical
15 matter that's true. The reality was, it was much like here, we
16 have -- what, 57 plaintiffs, but the reality is we have six
17 plaintiff groups. And so, that's the distinction.

18 THE COURT: Okay. All right. Where do you want to
19 go from here?

18:26:45 20 MR. OPPENHEIM: So I have a list of issues, and I
21 take them in whatever order Your Honor would like.

22 So we have hit two of them. I don't know whether
23 Your Honor just wants to take them in the order of the
24 instructions and go through them, if that's the easiest way to
25 do it.

1 THE COURT: That's fine. Are you working off
2 plaintiffs' instructions?

3 MR. OPPENHEIM: Yes, Your Honor. Let me grab my
4 binder.

5 THE COURT: Okay.

6 MR. OPPENHEIM: So I believe, Your Honor, that the
7 first issue that was addressed last time, the last charge
8 conference was an issue with respect to instruction 18.

9 Your Honor ruled against plaintiffs' request for
10 instruction number 18. We just renew and reserve our rights on
11 that, Your Honor.

12 This was the --

13 THE COURT: Testimony and documents by lawyers?

14 MR. OPPENHEIM: Right, just to preserve our
15 objection, Your Honor.

16 THE COURT: Okay.

17 MR. OPPENHEIM: And then the next issue is the DMCA
18 instruction.

19 THE COURT: And I've looked at that. And had the
20 opportunity to get your latest comments on it.

21 And I'm going to give Cox's instruction, which is
22 essentially my instruction at the beginning of the case cleaned
23 up. And your exception is noted on that.

24 MR. OPPENHEIM: We had -- so there were two parts to
25 our proposal. And the second part was to address potential

1 jury nullification. And the language we had asked for, Your
2 Honor, was, "to the extent that Cox's witnesses have testified
3 and Cox's counsel have argued that an ISP should not be held
4 liable for the infringing acts of its subscribers, you should
5 follow my instructions on the law of contributory and vicarious
6 liability."

7 THE COURT: And I am giving them those instructions.
8 And that's what they're going to be looking at when they
9 determine -- so you make that clear in your closing argument,
10 but I am not going to put it in an instruction.

11 MR. OPPENHEIM: Very well, Your Honor. I think the
12 next issue was the failure to call available witnesses.

13 THE COURT: Yeah. And again, I am not going to give
14 that instruction, but your exception is noted.

15 MR. OPPENHEIM: Thank you, Your Honor. I think then
16 we get to the copyright definition section. And I thought we
17 may have reached agreement on that.

18 Mr. Elkin, I think you said you were okay, but I
19 don't want to speak for you out of turn.

20 MR. ELKIN: This is instruction 22?

21 MR. OPPENHEIM: Yeah, the definition.

22 MR. ELKIN: So Ms. Golinveaux I think will address
23 this.

24 THE COURT: I am sorry, which instruction is this?
25 22?

1 MR. OPPENHEIM: Yes, the definition of copyright.

2 THE COURT: Okay.

3 MS. GOLINVEAUX: So, Your Honor, plaintiffs had
4 proposed a revised instruction number 25 on direct infringement
5 where they had added in the language, "a work is infringed by
6 the downloading or uploading of all," and then they added in
7 "or a part of a copyrighted work."

8 THE COURT: Right.

9 MS. GOLINVEAUX: And as we discussed last Thursday
10 evening with Your Honor, we think that is a misstatement of the
11 law and confusing, particularly in the direct infringement
12 section.

13 So when we were -- and Your Honor did not give that
14 language in the BMG instruction. It would clearly encompass,
15 for example, de minimis copying. And it's particularly
16 confusing in a case involving bits of data in the BitTorrent
17 network.

18 What we discussed with the opposing counsel last
19 night was to address their concern instead in the instruction
18:30:26 20 on the definition of copyright.

21 So where -- and what we would propose, if Your Honor
22 is inclined to do it -- and again, the Court didn't do it in
23 the BMG case at all, and I think it was clear, it is clear
24 without it, but it's more appropriate here when it refers to
25 the "exclusive right to reproduce the copyrighted work."

1 And what we would propose, if you -- again, if you're
2 inclined to do it, is "or a substantial part of it in copies."
3 That's the more appropriate place to deal with the issue.

4 THE COURT: You're on -- you're back on instruction
5 22?

6 MS. GOLINVEAUX: That's right, Your Honor. It's
7 instruction number 22 of the plaintiffs' proposed. And I'm
8 looking at the number 1, reproduce the copyrighted work.

9 THE COURT: Uh-hmm.

18:31:22 10 MS. GOLINVEAUX: And we would propose "or a
11 substantial part of it in copies."

12 MR. OPPENHEIM: Your Honor, if I may. So Mr. Elkin
13 raised the de minimis issue at the charge conference last week.
14 And we went back and took a look at it and thought about it.

15 De minimis copying only comes up in a substantial
16 similarity case. It's not an issue here. This is not a
17 substantial similarity case.

18 So the concept of in whole or in part is the right
19 concept. And I suppose we could deal with it in the copyright
18:32:07 20 definition. I don't -- we would have to include it in every
21 single one of the provisions, not just the reproduction. But
22 it also wouldn't be "substantial part." It's "in whole or in
23 part," that's the law. And "substantial part" is not the law.

24 So we could, I suppose, live with it in 22, but it
25 would make this even more painful because you would have to put

1 it in through -- in all of Sections 1 through 5, I believe.

2 MS. GOLINVEAUX: Your Honor, if I may, briefly.

3 THE COURT: Yes.

4 MS. GOLINVEAUX: I don't think you need to put it in
5 1 through 5 because 1 through 5 aren't appropriate in this
6 case. I believe it's just 1 and 3, the reproduction rights and
7 the distribution rights at issue.

8 MR. OPPENHEIM: I don't disagree that those are what
9 are at issue, but I would hate to misstate the law in an
10 instruction even if they're not necessarily at issue.

11 I think it's easier to just deal with in the context
12 of -- of 25. That way you only have to say it once. Which is,
13 I think, where it, frankly, belongs.

14 THE COURT: I'm not -- I must have the wrong copy of
15 25. Where does it say --

16 MR. OPPENHEIM: We provided you with a revised 25 on
17 Thursday, Your Honor.

18 THE COURT: Oh, that's where it disappeared.

19 MR. OPPENHEIM: I have brought one copy, but I'm
20 happy to give you my one copy. I'll just make sure I have --

21 THE COURT: I think we looked at it -- looked for it
22 here, and I have made it disappear forever. Is that it?

23 MR. OPPENHEIM: Oh, so I get your copy and he gets
24 mine. Thank you.

25 So if you look at the last paragraph, "if you find."

1 We added the language "all or a part of," which I think is a
2 lot simpler, cleaner way to deal with this than putting it in
3 the other provisions.

4 THE COURT: Okay. And you object to that,
5 Ms. Golinveaux?

6 MS. GOLINVEAUX: We do, Your Honor. And the
7 authority that they cite to support that doesn't support it.
8 It talks about -- when you look at the two cases at the end of
9 the authority that they cite, they refer to "substantial
10 portions of the works at issue."

18:34:48

11 So we really think it's inappropriate there. If it's
12 going to be properly dealt with, we do think it's in the
13 definitional section.

14 THE COURT: Why am I putting it in at all? Is there
15 testimony about that?

16 MR. OPPENHEIM: So, I think the -- the reason is I
17 don't -- I don't know what Mr. Elkin is going to say in his
18 closing, but I don't want him to get up and say, well, if they
19 only downloaded or uploaded a portion of the work, it's not an
20 infringement under the instruction. And I don't want to have
21 that issue after the fact.

18:35:20

22 MR. ELKIN: I'm not doing that.

23 THE COURT: Okay.

24 MR. OPPENHEIM: But I will strongly disagree with
25 what Ms. Golinveaux just said. If you look at the Supreme

1 Court's decision in Harper & Roe and the cite there, copying of
2 300 words from a 200,000-word manuscript was held to be
3 infringing. I'm pretty sure 300 out of 200,000 isn't
4 "substantially all."

5 THE COURT: Okay. All right, I'm going to give the
6 revised 25 instead of changing the definition of "copyright"
7 under instruction 22. And your exception is noted.

8 Where are we going now?

9 MR. OPPENHEIM: I actually think -- hate to move
10 backwards, but we skipped 23 where I believe that Cox had
11 proposed breaking out SRs and PAs. I mean, that's the
12 substantive difference. And I think that that depends upon
13 what -- that's going to depend on what Your Honor decides to do
14 on the two issues that we began this charge conference on.

15 THE COURT: Right. Okay. So if I decide that they
16 are -- that the SR/PAs are only entitled to one statutory
17 damages award, then you have looked at Cox's proposed
18 instructions and, of course object, but don't object on the
19 actual text?

18:36:09 20 MR. OPPENHEIM: So I don't believe that Cox's
21 proposed instruction deals with the overlap issue. So I'm not
22 sure that there's any instruction -- if somebody wants to
23 correct me, please do. I don't believe there's any instruction
24 currently proposed by Cox that suggests what the overlap is.
25 And there's certainly no evidence in the record yet on that.

1 So I think that 23 as we have drafted it is fine. I
2 don't even have a substantial objection to adding to the
3 plaintiffs' this many are SRs and this many are PAs, I don't
4 think that makes a difference. And that's fine from our
5 perspective as well.

6 I don't know that we need -- it needs to be the rest
7 of what Cox has proposed makes sense. There's more there than
8 is necessary or appropriate.

9 MR. BUCHANAN: Go ahead.

18:38:22 10 MR. ELKIN: So at least I think, if you take a look,
11 Your Honor, at -- I'm struggling because I see some red ink
12 here.

13 Was this original?

14 So Cox's proposed jury instruction 34 does deal with
15 the recordings and compositions.

16 THE COURT: I'm sorry, 24?

17 MR. ELKIN: 34.

18 THE COURT: 34, okay. Hold on.

19 MR. ELKIN: I think. It's entitled Statutory
18:39:04 20 Damages, Number of Works, Recordings and Compositions.

21 THE COURT: Okay. My 34 is Failure to Mitigate.

22 MR. ELKIN: So I was worried about that, that we
23 might have different ones.

24 MR. OPPENHEIM: It may be, Your Honor, that the
25 original of 34 was labeled Number of Works, Recordings and

1 Compositions.

2 MR. ELKIN: Sorry. I have it now. I apologize. The
3 one I have now is 32, Your Honor.

4 THE COURT: Okay. I'm with you.

5 MR. ELKIN: So that's the recordings and
6 compositions. And then there's one --

7 MR. OPPENHEIM: Is this your revised version?

8 THE COURT: Yeah.

9 MR. ELKIN: And then 31 deals with the number of
10 works and the compilations.

11 THE COURT: Yeah, this is the revised filed on
12 December 12. And -- right.

13 MR. OPPENHEIM: I apologize, Your Honor. We're at a
14 little bit of a loss. I'm looking for their revised version.

15 MS. GOLINVEAUX: We have an extra copy.

16 MR. ELKIN: We have an extra copy.

17 MR. OPPENHEIM: That would be very helpful, thank
18 you.

19 You are in 31? Which instruction, Michael, did you
20 just --

21 MR. ELKIN: I think I was referring to 31 and 32.

22 MR. OPPENHEIM: We would object to these, Your Honor.
23 The jury will have absolutely no idea what to do with these.
24 There's nothing that's been presented that they could use with
25 this.

1 THE COURT: I'm listening.

2 MR. OPPENHEIM: I think we would read this to them,
3 if they actually paid attention, they would scratch their heads
4 and say, how do we do this? And if I were on the jury, I would
5 too. And I get the issue.

6 I mean, how would they possibly figure out how to
7 follow this instruction? It just invites all kinds of
8 potential error and mischief.

9 THE COURT: All right. I'm going to pass on that.

18:42:08 10 What's your next one? What is Tregillis going to say
11 about -- I realize you've got 40 demonstrative slides, but the
12 bottom line is he's going to say that you should use iTunes,
13 and one song is worth a dollar, and I'm being generous because
14 when you look at the profitability numbers for songs, they're
15 actually at \$0.60 or \$0.70, right?

16 MR. ELKIN: I don't want Mr. Buchanan to get mad at
17 me, because I -- it's his witness, and I don't know what
18 they've done in the last several days to get ready. But I
19 think, Your Honor, essentially he's looking at a song and sort
18:43:02 20 of merging them, the music composition and sound recording, to
21 the extent that it's one.

22 He's looking at the net profit. So if it's a dollar
23 -- and I hope I'm not being held to this. I'm just trying to
24 give you an overview of my understanding.

25 THE COURT: Yeah.

1 MR. ELKIN: So let's say iTunes would charge a \$1.19,
2 and his understanding is that the record companies would get a
3 buck, and he's going to sort of add that up -- dollar. And if
4 you multiple that by the number of works that were infringed,
5 allegedly, you would get to a certain number.

6 THE COURT: Yeah.

7 MR. ELKIN: And of course, that's just one benchmark
8 that we're going to offer up that they should consider in
9 looking at statutory damages.

18:43:50 10 THE COURT: Okay. Thank you. Go ahead.

11 MR. OPPENHEIM: So, Your Honor, I think we're at 26
12 and 27, which are the copyright and vicarious instructions
13 which, I believe, there were no objections to at the
14 conference.

15 MR. ELKIN: Yes. Just in the order of expediency, I
16 think with respect to 26, I just mention that we're just
17 reserving on that issue on the substantial infringing works.

18 We know what Your Honor's position is on that and the
19 Fourth Circuit's opinion. But for good order sake, I'm just
18:44:37 20 raising and want to reserve on that.

21 And then on vicarious, I think the issue that I
22 thought we resolved at the last charging conference was to
23 insert the word "direct," which I think was in their
24 instruction as well.

25 And the other thing is --

1 MR. OPPENHEIM: I'm sorry. Where did you want to
2 insert "direct," just so I'm following? I thought it was in.

3 THE COURT: It's in. Yeah.

4 MR. ELKIN: Yes.

5 THE COURT: There was a direct infringement --

6 MR. ELKIN: I think last time they had argued that
7 they had wanted to -- for Your Honor to include that the right
8 to supervise includes the right and ability to suspend or
9 terminate, which we did not agree with. And I thought Your
10 Honor had said that you would not include that, that was not
11 part of your opening instruction, and we were fine with that.

12 THE COURT: I had, I think, focussed on whether or
13 not the person knew of the infringement, but maybe we talked
14 about the right and ability to supervise the infringing --

15 MR. ELKIN: Right. I think the one thing I pointed
16 out was in the -- in the opening instruction there was, I think
17 a typo in the instruction. It says right in the ability to
18 supervise, it should be the right and the ability.

19 THE COURT: Right, and the ability.

18:45:59 20 MR. ELKIN: But other than that, we were fine with
21 the instruction with the exception of including the word
22 "direct." I think both sides have agreed that "direct" is
23 appropriate. I think "direct" was not part of the opening
24 instruction.

25 THE COURT: Okay. All right, I am going to give 26

1 and 27 as you've agreed to amend.

2 Where do we go now?

3 MR. OPPENHEIM: I think the next issue is the
4 statutory damages, instruction number 30. And I think there
5 were a couple different issues here, Your Honor.

6 THE COURT: Penalty and --

7 MR. ELKIN: I'm sorry, Your Honor. Can we just go
8 back? Can we just hear the language on vicarious? There's
9 some dissonance on our side of the aisle in terms of
10 understanding exactly what it is. And I would appreciate it.

11 THE COURT: All right. So I've got vicarious
12 infringement, instruction 27, on page 32 of Sony's instruction.
13 That's where I am. So tell me where you disagree with --

14 MR. ELKIN: Well, they had in their -- if you skip
15 down to the third paragraph, they have "the right and the
16 ability to supervise such infringing activity." And they --
17 it's the rest of that sentence --

18 THE COURT: Oh, right.

19 MR. ELKIN: -- that we have a problem with. And I
18:47:23 20 think Your Honor at the last conference said you would not
21 include that.

22 THE COURT: Yeah, that's pretty gratuitous, and I'm
23 going to strike that part. Thank you.

24 MR. ELKIN: Thank you, Your Honor.

25 MR. OPPENHEIM: So I think the next issue, the next

1 issue is the punishment issue, Your Honor.

2 THE COURT: Yes.

3 MR. OPPENHEIM: We've submitted -- I think we both
4 submitted bench memos on this, Your Honor.

5 On the issue of punishment, and I gave a brief
6 overview of this on Thursday evening --

7 THE COURT: Yeah, I read your brief, so -- and the
8 cases. So I'm on it.

9 MR. OPPENHEIM: I'm sorry?

18:48:00 10 THE COURT: I'll hear anything you want to say. I
11 don't want you to go over what you argued in your brief.

12 MR. OPPENHEIM: Right. I won't -- I think, look,
13 Your Honor, the Supreme Court, First Circuit, Second Circuit,
14 Eighth Circuit, Ninth Circuit have all spoken to this, clearly,
15 and it's in there.

16 And in this context, you know, the way punishment
17 might be mete out is different than the way -- than deterrence
18 might be thought of by the jury.

19 And so, I think the jury should be allowed to
18:48:32 20 consider both. And I think that's what the weight of the law
21 suggests the jury should consider. I mean, I think the memos
22 speak at this at length.

23 I will say that with respect to the defendants' memo,
24 they cite to the Patry treatise. The Patry treatise cites to
25 an 1899 Supreme Court case called Brady versus Daly. Needless

1 to say, that decision predated not only the '76 Act, but the
2 1909 Act, and really bears no relevance whatsoever to this.

3 So I think that what's been cited by defendants is
4 really not applicable.

5 MR. EATON: Good evening, Your Honor.

6 I'm sure counsel just misspoke. We have not
7 submitted a brief on this. They handed us this this morning.
8 And I tried hard to turn one around by lunch, but I'm not quite
9 that good.

18:49:39 10 So if you will bear with me, I'll try and respond
11 orally. And if you still have questions after, we will submit
12 one after, but I'll double-check if you still want us to do
13 that.

14 THE COURT: Okay.

15 MR. EATON: I think what you're thinking of is our
16 other brief had some stuff in it about this issue, but that was
17 the mitigation brief, which you filed a different brief on and
18 so did we.

19 MR. OPPENHEIM: The mitigation brief addressed this
18:50:01 20 issue. That's obviously what I intended.

21 THE COURT: Yeah. Go ahead, please.

22 MR. EATON: So, Your Honor, a couple of things.

23 The language that they want to include is the need to
24 tell the jury that they can consider the need to punish Cox.
25 What they told you on Thursday was that they were going to come

1 back over the weekend with authority that used that
2 instruction, but they didn't find any. They don't cite a
3 single jury instruction in here that uses that language, and I
4 have never seen one. That's kind of point one.

5 They also said -- you know, I had made the argument
6 previously that to the extent punishment is relevant here at
7 all, it is relevant to the issue of deterrence, which everyone
8 agrees is an appropriate consideration in this context.

9 And Mr. Oppenheim said, well, no deterrence and
10 punishment are completely different things.

11 If that's true, and I'm not so sure that it is, then
12 their reliance on the very important Supreme Court case of F.W.
13 Woolworth versus Contemporary Arts is not particularly
14 persuasive. Because F.W. Woolworth, which is kind of the
15 fountainhead of this entire issue, says nothing at all about
16 punishment. What it says is: Statutory damages are designed
17 to compensate the rights holder and to discourage wrongful
18 conduct.

19 That's deterrence. And deterrence and punishment
18:51:21 20 overlap to some extent, right? I mean, you punish in order to
21 deter.

22 What you don't do, at least outside the criminal law,
23 is punish for the sake of punishment. And I think if you look
24 at the case law as it evolved down the years, what you'll see
25 is that to the extent that there are cases that talk about

1 punitive -- the punitive nature of this sanction, primarily
2 what they're saying is, you know, it's punitive in the sense
3 that it's intended to discourage wrongful conduct. Which is
4 all that Supreme Court has authorized in this context. None of
5 the other Supreme Court authorities that they rely on say
6 anything to the contrary.

7 There is -- oh, let me see. Again, I had about two
8 hours to work on this.

9 You know, Superior Form Builders, which is a Fourth
10 Circuit case they rely on pretty heavily, is sort of notable
11 for improving an instruction that says nothing about
12 punishment. It talks a little bit about culpability, but
13 that's not at all the same thing.

14 Sony BMG Music versus Tenenbaum, an important case
15 from the First Circuit, the First Circuit actually rejected the
16 district court's determination that the statutory damages award
17 should be largely -- sorry, am I talking too fast? Forgive me.
18 It's a bad habit. I will back up.

19 Sony BMG Entertainment versus Tenenbaum, First
20 Circuit, 2011, the Court in that case rejected the district
21 court's determination that statutory -- and I am quoting --
22 "that statutory damages awards should be treated largely as
23 punitive and not compensatory awards," ultimately holding that
24 statutory damages should not be treated as punitive for Seventh
25 Amendment purposes.

1 On Davis versus The Gap, under the Second Circuit
2 cases they cite, was a case about actual damages, not statutory
3 damages. So this sort of offhanded line that the Court
4 mentioned about statutory damages is dicta in the truest sense.

5 To the extent that -- I mean, it is absolutely true
6 that there are cases out there that use the word "punitive" in
7 the context of -- in this context. I'm not aware of any of
8 them that say anything that would suggest that you should
9 consider punishment outside of its capacity to deter future
18:53:24 10 infringing conduct.

11 That's all the Supreme Court has ever authorized. I
12 am not aware that the Fourth Circuit has authorized anything
13 beyond that, or any other circuit, in the way that they are
14 arguing it, at least.

15 Let me see if I have further points here. You know,
16 and, of course, Your Honor, when they say, you know, "nearly
17 every court to consider the issue has recognized that statutory
18 damages serve a punitive function," they are forgetting that
19 this Court said explicitly in BMG that the Copyright Act
18:53:55 20 statutory damages are not penal.

21 So I think they have significantly mischaracterized
22 the law in this area. I don't think that the copyright law has
23 evolved in this kind of manichaeian way where we're trying to
24 punish wrongdoers rather than simply deter the wrongful conduct
25 that is occurring.

1 I haven't seen any precedent for actually instructing
2 the jury to punish the defendant. And we strongly object to
3 the inclusion of that language.

4 THE COURT: All right. Thank you.

5 MR. OPPENHEIM: Your Honor, what counsel failed to
6 refer the Court to is the Feltner decision out of the Supreme
7 Court. And the Feltner decision out of the Supreme Court says,
8 quote: An award of statutory damages may serve purposes
9 traditionally associated with legal relief, such as
10 compensation and punishment.

11 As to the Tenenbaum case, Your Honor, the Court there
12 did include as a factor punishment. I know, I litigated the
13 case.

14 So the picking and the choosing the issue of
15 punishment from the First Circuit as it related to a due
16 process challenge is inapt.

17 As for the fact that the argument that we didn't cite
18 to any jury instructions -- well, jury instructions are a
19 product of the case law. And they should -- the jury
20 instructions, obviously -- and I am not telling you anything
21 Your Honor hasn't known for many, many years -- the jury
22 instructions should be built off of what the case law is.

23 And if the case law says, as we have cited and
24 believe it does say, that punishment is a factor, then
25 punishment should be included in the jury instructions.

1 And the idea that punishment only exists in the law
2 in order to deter is just flat wrong. There are times where --
3 that in order to punish somebody, you may level a much larger
4 or a much smaller award than what you would level when you're
5 trying to deter somebody. They call for different things.

6 And culpability, the notion that culpability is not
7 related to punishment, is, I think, just wrong. You only
8 punish those who are culpable. That's why we consider
9 culpability, in order to punish them.

18:56:23 10 So I think that opposing counsel has not cited cases
11 I believe that go the other way. I also think though, it's, I
12 will admit, somewhat of a difficult road to get there, the
13 Gonzalez decision out of the Fourth Circuit, which does talk
14 about punitive measures, does have some applicability here.
15 It's not in the context of the statutory damages regime, but it
16 does talk about the monetary assessments serving punitive
17 purposes.

18 So on that, I think we've presented to Your Honor
19 everything that is in our brief already.

18:57:01 20 THE COURT: All right. Well --

21 MR. EATON: Your Honor, if I may.

22 THE COURT: Yes, sir.

23 MR. EATON: I will be quick.

24 THE COURT: Yeah.

25 MR. EATON: Your Honor, with respect to Feltner,

1 forgive me for not mentioning it. I thought it was so
2 unimportant that I had it in a footnote in my notes. And the
3 reason for that is that it is not about this subject at all.

4 The question in that case was whether statutory
5 damages are a jury issue or a legal issue. And it made a
6 comment about what the general rule of monetary damages is,
7 which it says can include both compensatory and punitive
8 features.

9 It doesn't say -- it is by no means authority for the
18:57:35 10 proposition that the Supreme Court has said that you're allowed
11 to tell juries that you can punish copyright defendants. It's
12 nowhere close to that, Your Honor.

13 Let me think if there was something else I wanted to
14 get to. Oh, Gonzalez, Your Honor, as counsel correctly points
15 out, is from universes away from this context. It is an
16 immigration case involving a penalty. It has no possible
17 bearing here.

18 That's all, Your Honor.

19 THE COURT: Okay. Thank you. All right. I will
18:58:00 20 look at the Feltner case. I didn't give it in the BMG case.
21 And I am sure there was a good reason for that, but I forgot it
22 a long time ago.

23 MR. EATON: Your Honor, forgive me. Would you like
24 us to submit my two-thirds finished brief? I can do it.

25 THE COURT: Did you get the cases that Mr. Eaton

1 cited, which is really all we need?

2 MR. EATON: There is more than I said aloud.

3 THE COURT: Well, I am sure you focused on the
4 important cases.

5 MR. EATON: 100 percent.

6 THE COURT: I will give you -- why don't you just
7 give us the cases you relied on --

8 MR. EATON: We will do that after.

9 THE COURT: -- and we will take a look. Thank you.

18:58:42 10 But if you, for the record purposes, want to submit a
11 brief, I certainly am not going to stop you from doing that.

12 MR. EATON: Thank you, Your Honor.

13 MR. OPPENHEIM: Your Honor, otherwise in all right.
14 30, there is also -- there was a discussion we had on Thursday
15 on --

16 THE COURT: On the last paragraph?

17 MR. OPPENHEIM: The last two paragraphs, I think. I
18 think the last paragraph there shouldn't be any dispute about
19 that. That is Woolworth.

18:59:17 20 The second-to-last paragraph, there was a discussion
21 about.

22 THE COURT: "The effect the award may have on other
23 Internet service providers in the marketplace"?

24 MR. OPPENHEIM: Yes, Your Honor.

25 THE COURT: And have you thought about that? Do you

1 want to withdraw that sentence?

2 MR. OPPENHEIM: I kind of like it, Your Honor. And I
3 think I would like to have the Court deliver it. I recognize
4 that you're laughing, Your Honor, so maybe I'm just going to
5 have to just lose this one gracefully.

6 THE COURT: Yeah, I am going to cut that out. I
7 mean, do you want to modify and say, "the effect the award may
8 have on Cox"? Or do you want to leave it, "in considering what
9 amount would have a deterrent effect, you may consider Cox's
10 total profits"?

19:00:08

11 MR. OPPENHEIM: It is certainly appropriate for the
12 jury in considering deterrence and punishment to consider Cox's
13 total profits. And that is true. And though I like the idea
14 of adding in "the effect the award may have on Cox," I think
15 even if you end it just at "profits," we could live with that,
16 Your Honor.

17 THE COURT: Okay.

18 MR. EATON: Sorry, I'm just trying to see what --
19 what was the idea that you just proposed?

19:00:49

20 THE COURT: "The effect the award may have on Cox in
21 the marketplace."

22 MR. EATON: We don't have objection to that, Your
23 Honor.

24 THE COURT: All right. I will give it that way.

25 MR. EATON: On this one, there were -- their bench

1 brief, I think, raised at least one other issue, which is the
2 total profits issue, which I didn't get a chance to do a bench
3 brief on in response. We addressed this, to an extent, on
4 Thursday.

5 THE COURT: Yeah, in terms of what entity --

6 MR. EATON: Well, there is that issue, absolutely,
7 Your Honor. We think to the extent that you give this
8 instruction, I think it's important that you tether it to the
9 entities that are actually accused of infringement and not the
10 wider conglomerates.

11 You know, we object to its inclusion in general
12 because the instruction as currently written already instructs
13 the jury to consider the profits that Cox earned due to the
14 infringement, which we think is the appropriate context for
15 considering that issue.

16 It is certainly true that if you jack the damages up
17 large enough, that will have a larger deterrent effect. But
18 there has to be a limiting principle on that, Your Honor. It
19 can't be true that the size of your company determines the
20 deterrent effect, the amount of deterrence for every action
21 that you take. Right? I mean, you can overdeter to a
22 substantial extent.

23 And to the extent that counsel is arguing that
24 statutory damages are punitive in nature, well, then it's
25 hornbook law that they absolutely must be proportional to the

1 harm at issue. You can't get away from that if it's a
2 punishment. So we object to the inclusion of the total
3 profits.

4 Hold on a second, let me just make sure I'm done on
5 this issue.

6 THE COURT: So the first bullet, "profits Cox earned
7 because of the infringement," that's what --

8 MR. EATON: We're fine with that. Yes. It's the bit
9 later on on the second page of their instruction, "you may
10 consider Cox's total profits," was the part I was objecting to,
11 Your Honor.

12 And let me just --

13 THE COURT: How would you --

14 MR. OPPENHEIM: Maybe a clarifying statement helps on
15 this. Counsel, you haven't necessarily been here for the proof
16 that's been presented.

17 I think the only proof of profits that's been put in
18 is with respect to the one entity that's in the case. So I
19 don't know that there's going to be any confusion about other
20 entities' profits here.

21 MR. ELKIN: That's not true at all. They talked
22 about \$20 billion in terms of the Cox family of companies.
23 That was elicited on --

24 THE COURT: Bless you.

25 MR. ELKIN: That was elicited --

1 THE COURT: There were some big numbers floating
2 around, but -- so how do you suggest we focus on Cox, on the
3 plaintiff -- on the defendants in the case?

4 MR. OPPENHEIM: I believe --

5 THE COURT: Because that's --

6 MR. OPPENHEIM: The profits figure that was put in is
7 the profits figure with respect to the defendant. I think
8 that's what's in evidence.

9 Maybe there's some confusion over revenues issues,
10 but revenues aren't the issue here. It's profits. We're
11 not -- we're not suggesting that they should consider Cox's
12 revenues. That's a much larger number. Right?

13 THE COURT: Understood.

14 MR. OPPENHEIM: That's the 20 billion number.

15 THE COURT: Okay. All right. And your objection,
16 Mr. Eaton, to that is --

17 MR. EATON: Let me get to the podium.

18 Specifically -- I'm sorry, to clarify your question?

19 THE COURT: I'm looking at the language, "in
20 considering what amount would have a deterrent effect, you may
21 consider Cox's -- defendant Cox's total profits."

22 And you object to that? You know, it's late and I'm
23 old. I'm missing --

24 MR. EATON: Sure. Understood. We do, Your Honor,
25 for the simple reason that, as I explained, we think that the

1 appropriate measure that the jury should consider is profits
2 attributable to the infringement, which the instruction already
3 deals with.

4 THE COURT: Right.

5 MR. EATON: Your Honor, our only other issue --

6 THE COURT: You're not arguing -- are you arguing
7 that profits of the company should be considered?

8 MR. OPPENHEIM: Absolutely they should be, yes, Your
9 Honor.

19:04:49 10 THE COURT: Okay. Understood.

11 MR. EATON: Your Honor, we only had other on this
12 one. Which is that their instruction, unlike ours, does not
13 include mitigation as a consideration. There's obviously
14 reasons for that. Mitigation has metastasized into a, into a
15 large issue again, but that's our -- so long as mitigation
16 remains in the case, which I believe it does, it's
17 appropriately considered here as it was in BMG.

18 THE COURT: So in the BMG case I gave a mitigation
19 instruction. It passed muster with -- in the Fourth Circuit it
19:05:19 20 may not have even been an issue that was raised because the
21 jury didn't find mitigation. Or I don't know whether they did
22 or not because I didn't -- it wasn't in the jury instructions
23 themselves. It was something the jury should consider.

24 And now Cox has it as a line item in, you know, how
25 much should your vicarious infringement award be reduced

1 because of the failure to mitigate.

2 So what's your position now on that? I'm inclined to
3 give -- I'm going to give a mitigation instruction, and I'm
4 inclined to give the one I gave previously. I think it's a
5 fair instruction. There's evidence of -- I mean, it's not the
6 most compelling argument I've heard in a long time. Go ahead
7 and, you know, sue 10,000 subscribers.

8 But, okay, to the extent you want to make that
9 argument, do you think -- do you still believe that it should
10 be in the jury instruction as well?
19:06:28

11 MR. EATON: You mean the verdict form as well, or do
12 you mean --

13 THE COURT: I'm sorry. The verdict form.

14 MR. EATON: Yeah, yeah, just making sure. Yes, Your
15 Honor, we do. I mean, we think it's appropriately included
16 there just as -- just as willfulness is, for example. Both of
17 those things are -- if they're in the case, are things that the
18 jury should consider and that may effect the award that they
19 give. And if it's not put in the verdict form, it seems fairly
20 unlikely that they're going to find a way to consider it, even
19:06:52
21 if they're instructed on it.

22 So we do think it's appropriate there, and it is
23 sometimes given in that way, Your Honor. So we do favor its
24 inclusion in the form.

25 I see Mr. Oppenheim has a comment.

1 THE COURT: He's patiently waiting.

2 MR. OPPENHEIM: Yeah. This one, Your Honor -- and,
3 respectfully, I understand you gave it in BMG. Respectfully,
4 you were wrong. I won't -- I'm not going to color it another
5 way.

6 It's hornbook law in copyright law that when you have
7 joint tort-feasors, joint infringers, as a copyright owner,
8 you're allowed to select who you want to sue.

9 THE COURT: There's no question about that. But why
10 is that -- why are the two, you know, mutually exclusive?

11 I mean, the jury heard testimony about Napster.
12 About Sony suing individual subscribers. They stopped doing
13 it. Whether it was a PR problem or a management problem,
14 they've heard all that testimony, right?

15 MR. OPPENHEIM: They have. But what the -- what the
16 defense seeks to do is have the jury consider as a factor who
17 we decided to sue here. And that goes contrary to fundamental
18 hornbook copyright law. We get to choose who we get to sue.
19 That's number one.

19:08:09 20 And the jury doesn't get to discount the fact that we
21 didn't sue one or the other. We get to decide who we sue,
22 that's number one.

23 Two, that mitigation here is -- what they're trying
24 to do is say, we should -- we should have to sue -- in order to
25 recover our full damages, we should have had to have sued the

1 direct infringers.

2 But if that's the case, then Grokster is wrong.
3 Grokster recognizes there are instances where it's just
4 impossible. And there -- that's why you have second liability
5 claims.

6 I -- there are a lot of things that happen in the
7 course of a trial where we may somewhat disagree with the
8 Court, and at the end of the day, it's likely harmless error.

9 This is -- this is potentially reversible error, I
10 believe, Your Honor, because the law is so clear that we
11 don't -- A, that we don't have to sue the direct infringers.
12 We're allowed to choose Cox.

13 And, B, we're not allowed to essentially have that
14 thrown against us when we decide to sue Cox. The courts want
15 to encourage the efficiency of us going after the larger
16 entity.

17 So those are the first two arguments.

18 The third is, mitigation isn't about whether or not
19 you're precluded, which is what the defendants have been
20 arguing. Mitigation is about offsetting damages. That's what
21 mitigation is. And there's no argument here that we could have
22 offset damages. And they haven't presented any evidence on
23 that, nor could they.

24 So they've presented it as an all-or-nothing
25 proposition. And the jury shouldn't, shouldn't be looking at

1 that. There is no scenario where we could have offset our
2 damages. We're the victim.

3 And what they're trying to do is say, because we
4 chose to sue them instead of the direct infringers, we should
5 be held responsible for that decision, and the jury should
6 consider that and potentially reduce the damages.

7 That's contrary to what the existing law is, Your
8 Honor.

9 I'm not done, Michael, sorry.

19:10:15 10 The defendants haven't cited a single case -- they
11 have not cited a single case for the proposition that failing
12 to sue a direct infringer is worthy of a mitigation defense.
13 Not a single one.

14 They try to distinguish the Tenth Circuit case that
15 is analogous. Now, it's not a copyright case, but it's an
16 ERISA case where there was a similar statutory framework. And
17 there the Tenth Circuit clearly enunciated there was no
18 requirement to sue the underlying entity and there's no
19 mitigation.

19:10:53 20 So I believe that if we go down this road, that we're
21 essentially holding a plaintiff to a standard that the Supreme
22 Court has said we shouldn't be held to.

23 THE COURT: All right. Thank you.

24 MR. ELKIN: I know Your Honor has heard a lot about
25 Grokster. Believe it or not, you may be surprised to hear me

1 say this, this really is not Grokster.

2 This is a case where they have said, the plaintiffs
3 have said that Cox should terminate subscribers, this is action
4 that we should take. And I get why they have made that
5 argument.

6 The jury has heard a lot of evidence. The issue is,
7 in our view at least, what should we have done? Should we have
8 terminated them? If we should have terminated them, at what
9 point? And if we didn't terminate them, the worst of the
10 worst, what, if anything, could they do about it.

19:11:51

11 Grokster was not about that. Grokster was not about
12 an ISP network. It was about a company that induced file
13 sharers who used to be on Napster to use this decentralized
14 peer-to-peer technology to infringe copyrights.

15 This is different. This is a case directly against
16 the network itself and whether or not Cox should be responsible
17 for throwing -- or addressing specific subscribers.

18 So it's really -- it's a very different situation.
19 And maybe the jury will find at this point that we are making
20 relevant or not.

19:12:38

21 But the other thing I would say is that I could not
22 disagree more that mitigation is not applicable in copyright
23 infringement cases. It's -- there's an issue, frankly, about
24 the extent to which you could use it perhaps for damages in
25 certain circuits. I think the circuit -- we did find law, I

1 think it's reflected in our line item in the jury verdict
2 sheet, whether Your Honor accepts it or not, that says that you
3 can consider mitigation for some or all of the -- of what
4 they're claiming here.

5 I know that we disagree. I just wanted to get those
6 points out, and I appreciate Your Honor's patient.

7 THE COURT: No. Thank you.

8 MR. OPPENHEIM: In Grokster, Your Honor, companies
9 created a network, and that network induced infringement. And
10 so, in many respects it is analogous.

11 But the issue --

12 THE COURT: Well, did the Grokster decision say that
13 mitigation is not relevant when a rights holder sues an ISP?

14 MR. OPPENHEIM: No, Your Honor. The way Grokster
15 went up, I know this, unfortunately, all too well, is that the
16 District Court had granted summary judgment to the
17 defendants --

18 THE COURT: Non-infringing uses, all that.

19 MR. OPPENHEIM: On the Sony Betamax argument. The
20 Ninth Circuit affirmed that. The Supreme Court reversed at the
21 summary judgment stage. And in so doing, they made the
22 point -- and so, it's not that the question of whether
23 mitigation was an applicable affirmative defense, that didn't
24 go up to the Court.

25 THE COURT: Right.

1 MR. OPPENHEIM: But the point that the Court made
2 still applies. Which is that there are times where a copyright
3 owner brings a secondary liability claim, it's more efficient
4 and it's more appropriate.

5 And to suggest that there should be a mitigation
6 instruction to the jury would be to undermine the principle
7 that the Supreme Court articulated.

8 But I come back to, mitigation is an offsetting of
9 damages issue. And what the defendants have presented is this
10 idea that because we sued Cox, that they shouldn't be held
11 liable because we chose not to sue the direct infringers.
12 That's what they've said.

13 I also can't let go, Mr. Elkin got up here and said
14 that we have brought a case based on the idea that Cox didn't
15 terminate. That's not what our case is. And it's not a proper
16 interpretation of our case.

17 I think when you come back to the fundamental notion
18 that copyright infringers are jointly and severally liable for
19 an infringement, right, Cox is arguably jointly and severally
20 liable with the direct infringers, that's the way the law would
21 play out.

22 THE COURT: Well, that's why you have contributory
23 and various infringement instructions, right? I mean, the jury
24 is going to understand that that's what they're asked to
25 decide.

1 MR. OPPENHEIM: In the context of traditional
2 copyright law, if you have two parties who jointly engage in
3 infringement and you sue one, and you get a verdict against
4 one, that one can seek contribution from the other.

5 But there is no law that suggests that this one can
6 say, because you chose not to sue this one, the jury gets to
7 consider a lesser damage award. The defendants haven't cited
8 to any case law like that because I'm not aware that it exists.
9 But that's the principle that they're putting forward.

19:16:42 10 THE COURT: Okay. I'll look at Grokster, but I
11 really don't believe your argument is correct. I mean, I
12 think -- and we'll look at it a little further, but I don't --
13 I think you can -- unless I'm convinced otherwise, I'm going to
14 give the mitigation instruction. And I'm just not sure whether
15 I'm going to put it in the verdict form or not.

16 So what's your next one?

17 MR. OPPENHEIM: I'm not sure there were any issues on
18 the willfulness instruction, which would be the last one, I
19 believe.

19:17:37 20 MR. ELKIN: Your Honor, we -- I think we addressed
21 this at the last charging conference.

22 THE COURT: Yeah.

23 MR. ELKIN: We -- Your Honor gave the instruction
24 that was upheld by the Fourth Circuit. We know that you're not
25 going to change that instruction. We're just reserving in case

1 it goes up, up, up.

2 THE COURT: Okay. All right. So I am going to give
3 instruction 31 on willfulness as plaintiffs have proposed.

4 And, of course, your exceptions are noted.

5 All right. Where else are we going?

6 MR. OPPENHEIM: Your Honor, I think the remaining
7 issues are -- for us to address is the verdict form and the
8 length of the closing. That's all I have left on my list, I
9 believe.

19:18:30 10 THE COURT: So we talked about giving you an hour
11 each, and you thought that was a good idea. You might -- you
12 were thinking about whether you needed a little extra time for
13 the rebuttal.

14 Where are you on length?

15 MR. OPPENHEIM: I think we can do our initial opening
16 in the hour, but we would like 15 minutes for rebuttal, Your
17 Honor. We're trying to narrow the issues, and maybe we don't
18 need all that time, but we think that that's, that would allow
19 us to present the evidence cleanly.

19:19:05 20 THE COURT: All right. I will give you that.
21 Verdict form.

22 MR. OPPENHEIM: Verdict form.

23 THE COURT: Incredibly, I've found it.

24 MR. OPPENHEIM: So we did make some progress, Your
25 Honor, on the verdict form. There still remain some disputes.

1 Should we hand up a copy of your redline just so the
2 judge can follow this and we can identify the disputes?

3 So, Your Honor, I think the first question was
4 whether or not there needed to be a direct infringement
5 instruction, and Cox now agrees to remove that. So we're past
6 that hurdle.

7 THE COURT: Okay.

8 MR. OPPENHEIM: With respect to the liability for
9 contributory and vicarious infringement, we think that our
10 approach in our proposed verdict form is the better approach.
11 It is a cleaner, easier question to the jury.

12 We think that including "preponderance of the
13 evidence" and the language of "for direct infringement of it
14 subscribers" is unnecessary here.

15 We think that there is a lot of instructions that
16 you're going to give the jury, and to just call out those two
17 to put them in, I think just what we have proposed is, "is Cox
18 liable for contributory infringement of plaintiffs' copyrighted
19 works"? Yes or no. I think that's a simpler, easier question.

19:20:50 20 THE COURT: I always give the burden in the verdict
21 forms as well. It is -- is it repetitious? Yes, but I think
22 it's important to have it on the verdict form.

23 So I would leave it in there.

24 MR. OPPENHEIM: Okay. But we would recommend, Your
25 Honor, taking out "for the direct infringement of its

1 subscribers," because that's actually not even quite right. It
2 may be on the subscribers' account. I think that we should at
3 least limit it, end it after the word "liable."

4 I also on -- sorry, I want to go back to the
5 preponderance question, but -- which is the use of the word
6 "prove." We would prefer to use the word -- because that's a
7 loaded term, did plaintiffs establish or demonstrate, either
8 one of those would be fine if we are going to include the
9 preponderance language.

19:21:52 10 THE COURT: You want to use what word?

11 MR. OPPENHEIM: Instead of "prove," use either
12 "establish" or "demonstrate," either of those.

13 THE COURT: All right. Well, you see greater import
14 to the word "prove" than I do. But, all right --

15 MR. EATON: Your Honor, can we respond?

16 THE COURT: Yeah, I will give you an opportunity. I
17 am just highlighting the fact that they are -- okay. We're
18 in --

19 MR. OPPENHEIM: So we would take "for the direct
19:22:26 20 infringement of its subscribers" out and just end it after the
21 word "liable."

22 THE COURT: "Liable," right.

23 MR. OPPENHEIM: And then whatever we do on
24 contributory, we can --

25 THE COURT: Do the same.

1 MR. OPPENHEIM: -- do the same for vicarious.

2 For the third question, the number of works
3 infringed, we have a -- just kind of, I think, a cleaner
4 presentation of it, but I think ultimately we get to the same
5 place. They have agreed to put the number of works in.

6 I think ours is just -- I don't know if you're
7 looking at both. I think ours is just a cleaner presentation
8 of it for the jury.

9 Do you want me to keep going, Your Honor?

19:23:18 10 THE COURT: So this is your joint revised verdict
11 form?

12 MR. OPPENHEIM: No, no.

13 THE COURT: No? Okay.

14 MR. OPPENHEIM: Plaintiffs still believe their
15 approach is the right approach. We think this is a simple,
16 easy form for the jury to read and follow.

17 The way we have laid it out with the question and the
18 instruction in italics, "please proceed to this question," or
19 "please proceed to this question," is what we have found has
19:23:47 20 worked in the past to avoid confusion. We like that approach.
21 We think it is less likely to confuse the jury.

22 The defendants, after our conference, agreed to
23 certain changes, and that's the redline that you have been
24 handed, but it is not precisely what we presented.

25 Do you have the plaintiffs' proposed verdict form, or

1 should I hand it up?

2 THE COURT: I have yours, yes, absolutely.

3 MR. OPPENHEIM: Okay. With respect to -- so we
4 obviously think there is no place for a mitigation instruction
5 here. Especially, I mean, if Your Honor is going to giving it
6 in the context of a factor the jury can consider in damages,
7 that's one thing.

8 But here, the way it is proposed by the defendants,
9 is basically to take the case away from the jury on the ground
10 -- you know, and render a verdict on their behalf because there
11 is mitigation. I think totally improper, Your Honor.

12 On willfulness, poetry is sometimes found in less
13 words. And what we do is we say, "was Cox's conduct willful?
14 Yes or no." We think that's the way to do this.

15 Having an instruction: Willful Infringement Damages
16 Adjustment -- which is what the defendants suggested, it's not
17 even a -- I don't know what that is.

18 And then including the preponderance of the evidence
19 and the contributory or vicarious, it's just unnecessary. I
20 think the very clean, simple question is the way to go here.

21 And if you were going to use what the defendants have
22 suggested, the title should come out. And I see no reason to
23 have "contributory or vicarious infringement" in here again.

24 If you were going to have them, it wouldn't be "or,"
25 it would be "and/or." It's just a lot of -- I think we got it

1 down to four words, Your Honor. I think that's the way to go.

2 THE COURT: Okay.

3 MR. OPPENHEIM: In terms of amount of damages, Your
4 Honor, and this is based off of experience, we've proposed the
5 boxes at the top, which tell the jury what the range is for
6 each of the willful or non-willful. And that gives them
7 guideposts so that you avoid error. Because the last thing in
8 the world we want to do is have a jury say, for instance, not
9 willful and then come back at 35,000. And then we have got a
10 problem.

19:26:29

11 So we think this box helps to avoid that problem and
12 is the right way to go. The defendants disagree with us.

13 But we do agree that, you know, a simple question of
14 amount per work, we don't disagree on that.

15 Then the disagreement we have after that is should
16 there be -- should we ask the jury to do the math or the
17 arithmetic. Mr. Gould has told me we shouldn't ask people to
18 do arithmetic. Sorry, Your Honor, he gave it to me.

19 No, I -- really, the problem here, and Mr. Elkin and
19:27:11 20 I just disagree on this, I think, again, it invites the
21 possibility of error because if the math doesn't match the
22 amount per work, then we have to send the jury -- we have to
23 catch it and send the jury back to fix it.

24 So our preference would be to leave it off.

25 Mr. Elkin will say, we could check the math and fix it --

1 THE COURT: They will have a calculator back there.
2 They're kind of standard equipment for a jury.

3 MR. OPPENHEIM: I'm not going to die on my sword on
4 this one. Just aware that if we do give the calculation before
5 we release the jury, we should all double-check the math before
6 we let them go.

7 THE COURT: Understood. Okay. Mr. Eaton.

8 MR. EATON: Your Honor, I will be brief, I think.

9 As counsel told you, we agreed to drop the direct
10 infringement instructions.

11 On the contributory and vicarious infringement
12 instructions, I think Mr. Oppenheim objects to the word
13 "prove."

14 Your Honor, we're in a court of law. We don't ding
15 people for \$2 billion in damages because -- by demonstrating
16 something. They are proving their case. That's the correct
17 word to use.

18 They will be instructed on what that means. That
19 instruction will include a sentence saying that, you know, to
20 the extent you know something about beyond a reasonable doubt,
21 that doesn't apply here. It's the appropriate word to use.

22 I think Your Honor already said you are going to give
23 the preponderance standard in the instruction, so I won't
24 bother with that.

25 Including the language, they want to strike the words

1 "for the direct infringement of its subscribers." We would
2 like to keep that, Your Honor, kind of as an exchange for
3 dropping the separate instruction on it. We think it's
4 important that the jury understand that this is secondary
5 liability, and that there is an intermediate step that has to
6 be found first. We think that that is appropriate.

7 That is essentially -- the same issues, essentially,
8 I think, are in place on both contributory and vicarious.

9 On the number of works, we agreed to include the
10 numbers in there at their request. I think their only other
11 quibble with that is the repetition of the words "vicariously"
12 or "contributorily." It doesn't strike me as being a terrible
13 burden on the jury to have to read those two words.

14 Mitigation, I think we have kind of talked to death,
15 Your Honor. I am happy to address it if you would like, but I
16 suspect you wouldn't like.

17 THE COURT: No. No.

18 MR. EATON: On willful, we don't -- we are not wedded
19 to the word "damages adjustment" at the end of the title. We
20 are happy to take that out.

21 The rest of it, I think, Your Honor, it's consistent
22 with the way we have written all the other instructions. It
23 has the preponderance standard in it. It mentions what kind of
24 infringement is at issue. That strikes us as being pretty
25 vanilla.

1 And on the amount of damages, the -- for reasons that
2 I could probably go into at some length, we think that the
3 multiplication of the per work times the number of works is the
4 appropriate way to ensure, in fact, that the jury understands
5 what it is doing and does it correctly. It is a simple
6 multiplication and it will correctly convey the magnitude of
7 the award.

8 If Your Honor doesn't have any questions, I will sit
9 down.

19:30:27 10 THE COURT: So on willful infringement, Mr. Oppenheim
11 mentioned it should be "contributory and/or vicarious
12 infringement was willful."

13 MR. EATON: Well, Your Honor, the grammar police
14 would tell me that you should never use "and/or" as a
15 construction, and that "or" is always suitable where "and/or"
16 is wanted. And I will leave it at that.

17 THE COURT: Okay.

18 MR. OPPENHEIM: I think the grammar police would say
19 if you put in "or," you need to put in "or both," which makes
19:31:04 20 it even longer. It's like four words.

21 MS. GOLINVEAUX: Your Honor, I apologize, but
22 speaking of willfulness, we skipped over something in the jury
23 instructions, if I you could just briefly.

24 THE COURT: Back to 31?

25 MS. GOLINVEAUX: This is Sony's instruction number

1 31, that's right.

2 THE COURT: Okay. I am with you.

3 MS. GOLINVEAUX: So, Your Honor, their first
4 paragraph is, I believe, verbatim what you gave in the BMG
5 case, but you ended after the first paragraph.

6 They have added on this second paragraph, which we
7 think is more confusing than anything else. So we would ask
8 Your Honor give the first paragraph like you did in BMG.

9 MR. ELKIN: Your Honor, just one discrete issue on
10 the verdict sheet. I think Mr. Eaton hit it, but -- and I
11 think Your Honor also commented on it as well. We do think
12 having them total the damages is very important.

13 I don't like to bring personal problems into this
14 discussion, but I -- back in 2001 we had a two-and-a-half week
15 jury trial. And over my objection, the District Court judge
16 took that out. And the jury came back with an award that was
17 inconsistent with their -- what they had decided. And the
18 judge had summoned each of the eight jurors back, and
19 ultimately had to declare a mistrial because they didn't do the
20 math.

21 And I pointed that out last night to Mr. Oppenheim,
22 and I can hand up a decision which recounts all of these facts.
23 But we would implore Your Honor to allow the jury to do the
24 addition.

25 The only question I have in terms of the closing

1 tomorrow is that if Mr. Oppenheim is going to get 75 minutes,
2 60 and 15, I don't know that I need more than hour, but I
3 assume that since he has a total of 75, if I went over up to
4 75, that's --

5 THE COURT: You're not --

6 MR. ELKIN: -- not going to be a problem?

7 THE COURT: It's going to be a problem.

8 MR. ELKIN: Thank you, Your Honor.

9 THE COURT: All right. So willfulness, instruction
10 31.

19:33:18

11 MR. OPPENHEIM: So, Your Honor, the reason we
12 included the second paragraph is it's an instruction that we've
13 had given before, is that it explains what the first paragraph
14 means.

15 It gives it some context. Otherwise it's throwing up
16 words like reckless disregard and willful blindness without
17 giving any kind of exposition as to what they all are. They
18 are instructions that we've had given before in copyright
19 cases. So I think it's appropriate here.

19:33:51

20 If Your Honor is ready, I'll go back to the verdict
21 form on the few issues that remain.

22 THE COURT: Yes, sir. Go ahead.

23 MR. OPPENHEIM: I'm happy to answer any questions you
24 have on the willfulness instruction.

25 THE COURT: No, go ahead.

1 MR. OPPENHEIM: Okay. So I think that -- the problem
2 with including the "for the direct infringement of its
3 subscribers" in the contributory and vicarious instruction is
4 that Cox is proposing to insert one of the elements of the
5 claim into the instruction, but not all of the elements into
6 the claim.

7 You could say "knowing," you could say, you know,
8 "material contribution." Direct infringement is just one of
9 the elements of the claim.

10 So I'm not sure why we would insert that particular
11 element unless we really are attempting to -- to skew what the
12 jury is doing.

13 And less is more for the jury. When instructions are
14 cleaner and shorter, it's easier for them. And I think that
15 that certainly is the case here. Especially the language they
16 use, because it's not the necessarily the direct infringement
17 of its subscribers. It could be the direct infringement of the
18 subscriber's family members, the end users. The AUPs, which
19 we've heard way too much about, all say that the subscribers
20 are liable for the activities on their account, whether it's an
21 end user, it's a family member, it's anybody else.

22 So to put in here something that's contrary to
23 evidence that's been presented, I think would be misleading. I
24 would just take it out. I think that's the appropriate
25 approach on this.

1 THE COURT: Well, what do you without having any
2 instruction on direct infringement then? It's in the general
3 instructions, of course.

4 MR. OPPENHEIM: Right. And it's an element of the
5 claim. I mean, we don't have on the verdict form "material
6 contribution." We don't have "financial benefit." We don't
7 have "right or ability to supervise." "And ability," "and
8 ability to supervise." Right.

9 We haven't put in the elements in the verdict form.
10 And there's a reason we haven't, because that's not what you
11 do.

12 So I don't see why we would do it here. Just because
13 Cox magnanimously agreed to remove an otherwise totally
14 inappropriate question on the verdict form, doesn't mean that
15 they can insert it down below. It was inappropriate above and
16 it's inappropriate below.

17 Again, less is -- is more here, Your Honor.

18 THE COURT: What if we put in "was contributorily
19 liable for infringement"?

19:35:59 20 MR. OPPENHEIM: We could live with that as a
21 compromise, Your Honor.

22 THE COURT: Mr. Eaton?

23 MR. EATON: Your Honor, we would -- thank you. We
24 prefer the language as we have proposed it. As Your Honor will
25 recall, you gave a direct infringement instruction, a separate

1 one, in BMG. It is not a wildly inappropriate instruction to
2 give. Nor is it an element of the claim. It's a condition
3 precedent to bringing the claim. It's a significant part of
4 what is being litigated in this case.

5 We think that to have a verdict form with no
6 reference to it would be misleading.

7 Oh, "and subscribers," Your Honor. We also think is
8 an important point. The subscribers are the only people who
9 are bound by the authorized -- is it authorized use policy?
10 Acceptable Use Policy. So they are the relevant party here,
11 that's all we would submit.

12 THE COURT: Go ahead.

13 MR. OPPENHEIM: That is precisely the mischief that
14 we're worried about, Your Honor. We don't want an argument on
15 closing that says, well, if it were end users and they were --
16 it was a commercial ISP, then you shouldn't hold Cox liable for
17 that. That would be an approach that -- that would be an
18 approach that really would seek to do mischief.

19 And I don't believe that the instruction that you
19:37:50 20 gave in BMG said anything about subscribers, Your Honor. I
21 think it talked about users of Cox's Internet service.

22 Anyway, we're fine with your proposed compromise,
23 Your Honor.

24 My last comment, "direct infringement" is an element
25 of the claim. I don't know what "condition precedent" is.

1 That's a contractual issue. It's not -- it's not something
2 that exists in copyright law.

3 THE COURT: Okay. Okay, all right. The verdict
4 form, I'm going to -- the requirement of direct infringement is
5 right in the instructions. I'm just going to say, "did
6 plaintiff prove by a preponderance of the evidence that Cox was
7 contributorily liable for infringement," and make the same
8 change, do the numbers.

9 And we'll get you the rest shortly. I want to look
10 at the case about the mitigation, whether to put it in the
11 verdict form or not.

12 And also give you the -- our decision on whether
13 we're going to allow separate awards for the music versus the
14 songs. And we'll get that to you tonight.

15 MR. OPPENHEIM: Great. May I suggest a logistics
16 question, Your Honor?

17 THE COURT: Yes.

18 MR. OPPENHEIM: Just trying to figure out the timing
19 of tomorrow.

19:39:46 20 I assume we're not going to be in a situation where
21 we're going to have, for instance, plaintiffs deliver their
22 closing, and then go home for the evening and come back, and
23 have the defendants deliver their closing?

24 So at what point in the day do we say, we're going to
25 do it Wednesday morning?

1 THE COURT: I'm not going to send the jury home at
2 3 o'clock because I think they'll stay late and finish it up.

3 If we're at 4 o'clock and only one closing is going
4 to be possible, then we'll do it the following morning.

5 Or do you want me to give my instructions before or
6 after your closing arguments?

7 MR. OPPENHEIM: In all candor, what I -- my true
8 preference, Your Honor, would be to give the instructions, and
9 then to do the closing first things Wednesday morning to allow
10 us to incorporate -- to make sure we get the law right in our
11 closings as you deliver it. Make sure we have the verdict form
12 right.

13 THE COURT: Yeah. I have been giving the
14 instructions first just so they can be used if appropriate.
15 And I think it's helpful to the jury.

16 It's not -- I think -- and I'm not sure if there's
17 another judge that does it that way here in EDVA, but it's been
18 done differently, different ways.

19 Mr. Elkin, do you have a preference?

19:41:19 20 MR. ELKIN: No, Your Honor. We'll go with whatever
21 Your Honor's practice is.

22 I think the jury has been working very hard. I don't
23 think we've had any delays at all. And I certainly, if the
24 Court is willing and there's sufficient time to stay late and
25 just get it done, let them deliberate and finish this. So

1 that's my preference.

2 I sort of took what Your Honor said to heart on
3 Thursday night to confine the closing to an hour, or frankly
4 even less, but I think we should let the jury get to their
5 work.

6 THE COURT: Yeah. If we can do it, we'll finish it
7 up tomorrow evening, and keep them a little later, and they can
8 begin the deliberations. And you all can check to make sure
9 that the exhibits that they're going to get are the correct
10 exhibits, and -- but let's see how the -- part of that will
11 depend on whether we focus on the important testimony and it
12 doesn't get strung out tomorrow.

13 All right. Then, thank you. We'll get you an answer
14 on this and put our instructions together. We'll probably not
15 have that -- we'll get you the decisions you need, but maybe
16 not the final instructions until the morning or sometime
17 mid-morning.

18 All right, we're in recess. Have a good evening.

19 MR. OPPENHEIM: Thank you, Your Honor.

19:42:56 20 MR. ELKIN: Thank you, Your Honor.

21 NOTE: The December 16, 2019, portion of the case is
22 concluded.

23 -----

24

25

CERTIFICATE OF COURT REPORTERS

We certify that the foregoing is a true and
accurate transcription of our stenographic notes.

/s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR

/s/ Anneliese J. Thomson
Anneliese J. Thomson, RDR, CRR